110-108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~600.~~ ~~3074~~ 59

THE KELLOGG BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS H. HAMILTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 5, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 600.

THE KELLOGG BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS H. HAMILTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Petition for removal and transcript	2	1
Defendant's answer	32	13
Reply	41	16
Verdict of jury	44	17
Motion for new trial	45	18
Judgment on verdict	47	19
Bill of exceptions	49	19
Supersedeas bond	77	28
Citation	80	29
Certificate	81	29
Writ of error	82	29

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and western division of the northern district of Ohio, begun and held at the court-rooms in the city of Toledo, in said district, on the first Tuesday in December, one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and fourth year.

Present, the honorable Martin Welker, district judge, sitting as circuit judge. Among the proceedings had were the following, to wit:

1½ There was filed in said court by the plaintiff in error on the 3d day of December, A. D. 1878, the following transcript, to wit:

2 THOMAS H. HAMILTON
vs.
KELLOGG BRIDGE COMPANY. } 1773S.

Pleas before the court of common pleas within and for the county of Lucas and State of Ohio, at a term thereof begun and held at the court-house in the city of Toledo, in said county, on Monday, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, Hon. Reuben C. Lemmon, Hon. Birdseye W. Rouse, presiding judges.

Be it remembered that heretofore, to wit, on the 17th day of July, 1878, plaintiff, by his attorneys, filed in said court his petition in the above-entitled cause, which petition is in the words & figures as follows, to wit:

Petition.

Court of common pleas of Lucas County, Ohio.

THOMAS H. HAMILTON, PLAINTIFF,
against
THE KELLOGG BRIDGE COMPANY, DEFENDANT. }

The plaintiff, Thomas H. Hamilton, now comes and for cause of action against the defendant says:

FIRST CAUSE OF ACTION.

That the said The Kellogg Bridge Company is a body corporate under and pursuant to the laws of the State of New York, with its
3 principal business office at Buffalo, in New York.

That the defendant having theretofore undertaken to construct for the Lake Shore and Michigan Southern Railroad Company an iron bridge of a certain special character across the Maumee River at Toledo, Ohio, for the use of the track of said railroad company, and having begun the making of preparations for the putting up or erection of such bridge on the fifteenth day of December, A. D. 1877, entered into a certain contract in writing with plaintiff whereby it was agreed by and between plaintiff and defendant as follows:

That plaintiff should prepare and furnish all necessary false work and erect said iron bridge for defendant, receiving all material

therefor as it might arrive on the cars at the site of said bridge, and erecting the same in the best manner according to the design of said bridge and the directions of defendant from time to time, and commencing the same when required by the defendant, and proceeding with a force sufficient to complete such erection on or before March 1st, A. D. 1878.

That plaintiff should assume liability for and pay for all work done and material furnished by defendant prior and up to the time of the making of said contract, including therein piling, and piles, timber, and other materials, and labor then done on the same, but not including bolts and washers, which had been furnished by defendant, but plaintiff on completion of the bridge to return to defendant said bolts and washers or pay for the same.

4 That plaintiff should perform all the stipulations of said agreement in a thorough and workmanlike manner, and to the reasonable satisfaction of defendant; and if defendant at any time should not be satisfied with plaintiff's manner of or his speed in performing said work, it might put on such force as might be necessary to complete the work within the time named, and provide such bolts or materials for false work as might be necessary, and charge the cost of the same to plaintiff, who agreed to pay therefor. That defendant should pay plaintiff for such putting up of such bridge the sum of four thousand and three dollars ($4,003), as follows: Nine hundred dollars on completion of the first span, nine hundred dollars on completion of the second span, eight hundred dollars on completion of the third span, and on completion of the draw and the entire work the further sum of fourteen hundred and three dollars; but each payment to be made only on the acceptance of each part of the work by the chief engineer of the Lake Shore and Michigan Southern Railroad Company, on the fifteenth day of each month after such acceptance. That defendant should furnish to plaintiff, at the site of said bridge, all the material of said bridge in all respects fitted and ready for erection, and in such time as would enable plaintiff to proceed with such erection so as to complete the same by said first day of March, A. D. 1878.

That under said contract plaintiff made ready and erected said
5 bridge, in all respects carrying out and performing each and all of his undertakings in said contract, save that said bridge was not completed by said first day of March, A. D. 1878, but such failure of plaintiff was and is wholly owing to the neglect and failure of defendant to provide in time the necessary materials therefor, duly and properly fitted for putting up. That said work of plaintiff has in all respects been done to the satisfaction of defendant, and to the satisfaction and acceptance of the chief engineer of said Lake Shore and Michigan Southern Railroad Company. That by reason of the premises the plaintiff became entitled to have and receive from defendant said sum of four thousand and three dollars, and the same now is due and owing to him from said defendant, save as hereinafter stated.

SECOND CAUSE OF ACTION.

The plaintiff, for a second cause of action against defendant, says that the said The Kellogg Bridge Company is a body corporate under and pursuant to the laws of the State of New York, with its principal business office at Buffalo, New York. That the defendant having theretofore undertaken to construct for the Lake Shore and Michigan Southern Railroad Company an iron bridge of a certain special char-

acter across the Maumee River at Toledo, Ohio, for the use of the track of said railroad company, and having begun the making of preparations for the putting up *in* erection of such bridge, on the fifteenth day of December, A. D. 1877, entered into a certain contract in writing
6 with plaintiff whereby it was agreed by and between plaintiff and defendant as follows: That plaintiff should prepare and furnish all necessary false work and erect said iron bridge for defendant, receiving all material therefor as it might arrive on the cars at the site of said bridge, and erecting the same in the best manner according to the design of said bridge and the directions of defendant from time to time, and commencing the same when required by the defendant, and proceeding with a force sufficient to complete such erection on or before March 1st, A. D. 1878.

That plaintiff should assume liability for and pay for all work done and material furnished by defendant prior and up to the time of the making of said contract, including therein piling and piles, timber, and other materials, and labor then done on the same, but not including bolts and washers, which had been furnished by defendant, but plaintiff on completion of the bridge to return to defendant said bolts and washers or pay for same.

That plaintiff should perform all the stipulations of said agreement in a thorough and workmanlike manner, and to the reasonable sat-
7 isfaction of defendant; and if defendant at any time should not be satisfied with plaintiff's manner of or his speed in performing said work, it might put on such force as might be necessary to complete the work within the time named, and provide such bolts or material for false work as might be necessary, and charge the cost of the same to plaintiff, who agreed to pay therefor.

That defendant should pay plaintiff for such putting up of such bridge the sum of four thousand and three dollars ($4,003), as follows:

Nine hundred dollars on completion of first span;

Nine hundred dollars on completion of second span;

Eight hundred dollars on completion of the third span; and on completion of the draw and the entire work the further sum of fourteen hundred and three dollars; but each payment to be made only on the acceptance of each part of the work by the chief engineer of the Lake Shore and Michigan Southern Railroad Company, on the fifteenth day of each month after such acceptance. That defendant should furnish to plaintiff, at the site of said bridge, all the material of said
8 bridge in all respects fitted and ready for erection and in such time as would enable plaintiff to proceed with such erection, so as to complete the same by said first day of March, A. D. 1878.

That plaintiff, to enable him from time to time to proceed with said work, was compelled to and at the request of defendant he did procure and pay for extra materials that should have been provided and paid for by defendant and paid for defendant, at its request certain bills, in the aggregate sum of forty-five and $\frac{18}{100}$ dollars, a schedule of which is as follows:

Cash for coal bills	6 00
" " brimstone	1 28
" " sal amoniac	2 00
" " spikes	9 65
" " washers	2 72
" " bill of Haughton & Kniesser	4 13
" " " " blacksmith	7 40

"	to Chris. Pinelander	6 00
"	for board	4 00
"	" drugs of Bailey	70
		$45 18

Wherefore plaintiff is entitled to have and recover of defendant, and there is due and owing from defend' to plaintiff, said sum of forty-five $\frac{18}{100}$ dollars.

THIRD CAUSE OF ACTION.

The plaintiff, for his third cause of action against the defend-
9 ant, says that the said The Kellogg Bridge Company is a body corporate under and pursuant to the laws of the State of New York, with its principal business office at the city of Buffalo, in said State.

That the defendant having theretofore undertaken to construct for the Lake Shore and Michigan Southern Railroad Company an iron bridge of a certain special character across the Maumee River at Toledo, Ohio, for the use of the tracks of said railroad company, and having begun the making of preparations for the putting up or erection of such bridge, on the fifteenth day of December, A. D. 1877, entered into a certain contract in writing with plaintiff whereby it was agreed by and between plaintiff and defendant as follows:

That plaintiff should furnish and prepare all necessary false work and erect said iron bridge for defendant, receiving all materials therefor as it might arrive on the cars at the site of said bridge, and erecting the same in the best manner according to the design of said bridge and the directions of defendant from time to time and commencing the same when required by defendant, and proceeding with a force sufficient to complete such erection on or before March 1st, A. D. 1878.

That plaintiff should assume liability for and pay for all work
10 done and materials furnished by defendant prior and up to the time of the making of said contract, including therein piling and piles, timber, and other materials, and labor then done on the same, but not including bolts and washers, which had been furnished by defendants, but plaintiff on completion of said bridge to return to defendant said bolts and washers or pay for same. That plaintiff should perform all the stipulations of said agreement in a thorough and workmanlike manner, and to the reasonable satisfaction of defendant; and if defendant at any time should not be satisfied with plaintiff's manner of or his speed in performing the work, it might put on such force as might be necessary to complete the work within the time named, and provide such bolts or materials for false work as might be necessary, and charge the cost if the same to plaintiff, who agreed to pay therefor.

That defendant should pay plaintiff for such putting up of said bridge the sum of four thousand and three dollars ($4,003), as follows:

Nine hundred dollars on completion of the first span;

11 Nine hundred dollars on completion of the second span:

Eight hundred dollars on completion of the third span; and on completion of the draw and entire work the further sum of fourteen hundred and three dollars; but each payment to be made only on the acceptance of each part of the work by the chief engineer of the Lake Shore and Michigan Southern Railroad Company, and on the fifteenth day of each month after such acceptance. That defendant should fur-

nish to plaintiff, at the site of said bridge, all the material of said bridge in all respects fitted and ready for erection, and in such time as would enable plaintiff to proceed with said erection so as to complete the same by said first day of March, A. D. 1878; that said materials so to be furnished by defendant was pretendedly prepared by defendant at its shops at Buffalo, in New York State, and thence shipped by rail to Toledo, where it was to be by plaintiff erected into said bridge; but plaintiff alleges that when it was received by plaintiff from time to time, and plaintiff was about to put the same in bridge, it was found to be, and it in fact was, in size, in workmanship, fitting, and material defective, and unsuited to its purpose and design to a very large
12 extent, and plaintiff was compelled to, and, at the request of defendant, did, to properly prepare and fit and adapt the same to the uses designed for the same by defendant, bestow and expend a large amount of extra labor and work in and about shaping, fitting, and otherwise adapting the same to the purposes of said bridge, to wit, of the value of twenty-eight hundred and seventy-five dollars, which said sum is due and owing from defendant to plaintiff.

FOURTH CAUSE OF ACTION.

The plaintiff, for his fourth cause of action against the defendant, says:

That the said The Kellogg Bridge Company is a body corporate under and pursuant to the laws of the State of New York, with its principal business office at the city of Buffalo, in said State.

That the defendant having theretofore undertaken to construct for the Lake Shore and Michigan Southern Railroad Company an iron bridge of a certain special character across the Maumee River at Toledo, Ohio, for the use of the track of said railroad company, and having begun the making of preparations for the putting up or erection of such bridge, on the fifteenth day of December, A. D. 1877, entered into a certain contract, in writing, with plaintiff, whereby it was
13 agreed by and between plaintiff and defendant as follows:

That plaintiff should prepare and furnish all necessary false work and erect said iron bridge for defendant, receiving all material therefor as it might arrive on the cars at the site of the said bridge, and erecting the same in the best manner according to the design of said bridge and the directions of the defendant from time to time, and commencing the same when required by the defendant, and proceeding with a force sufficient to complete such erection on or before March 1st, A. D. 1878.

That plaintiff should assume liability for and pay for all work done and material furnished by defendant prior and up to the time of the making of said contract, including therein piling and piles, timber, and other materials, and labor then done on the same, but not including bolts and *ma*shers, which had been furnished by defendant, but plaintiff, on completion of the bridge, to return to defendant said bolts and *ma*shers or pay for same.

That plaintiff should perform all the stipulations of said agreement in a thorough and workmanlike manner, and to the rea-
14 sonable satisfaction of defendant; and if defendant at any time should not be satisfied with plaintiff's manner of or his speed in performing said work, it might put on such force as might be necessary to complete the work within the time named, and provide such bolts or material for false work as might be necessary, and charge the cost of the same to the plaintiff, who agreed to pay for them.

That defendant should pay plaintiff for such putting up of such bridge the sum of four thousand and three dollars ($4,003), as follows: Nine hundred dollars on completion of the first span; nine hundred dollars on completion of the second span; eight hundred dollars on completion of the third span; and on completion of the draw and the entire work the further sum of fourteen hundred and three dollars; but each payment to be made only on the acceptance of each part of the work by the chief engineer of the Lake Shore and Michigan Southern Railroad Company, on the fifteenth day of each month after such acceptance.

That defendant should furnish to plaintiff, at the site of said bridge, all the material of said bridge, in all respects fitted and ready for erection, and in such time as would enable plaintiff to proceed with
15 such erection so as to complete the same by said first day of March, A. D. 1878.

That defendant failed and neglected to do and perform its obligations under said contract to plaintiff in this, that it being its duty to provide on the cars, at the site of said bridge in Toledo, all of the material of which said bridge should be composed, promptly and in proper time to enable plaintiff to have said bridge completed by March 1st, 1878, proper in quality and duly and properly manufactured and fitted in all respects ready for erection in said bridge, yet said defendant failed and neglected to have said material duly and properly prepared in size and shape, in material entering into the several parts thereof, in the fitting of the several parts and pieces, so that the same would go together properly, also failed and neglected to have all of the parts necessary for the several spans forwarded to plaintiff at the same time, or at such times as would not hinder or delay plaintiff in his said work, and so continued and failed to furnish such properly wrought and fitted material for the respective spans and the draw of said bridge as that and wholly by reason thereof plaintiff was prevented from finishing said bridge in the period of two and one
16 half months, to wit, by March first, A. D. 1878, and compelled to give his own time and attention to said work for the time of nearly seven months, and the use of his tools and appliances for a like time, and by reason of numerous delays in the arrival of said bridge material from defendant from time to time, and the aforementioned defects in the same, and the fit and adaption of the same, and the unfulfilled assurances of defendant from time to time as to the arrival *of* said bridge of the necessary material therefor, and upon which plaintiff relied, plaintiff was subjected to great loss of time of himself and his necessary employees, to great and unavoidable loss and extra expense in and about the erection and maintenance of the necessary false work, piles and piling, for the putting up of said bridge.

And plaintiff further alleges that when he agreed to erect for defendant said bridge, and to accept of defendant the material, appliances, and false work then provided by defendant for use in putting up said bridge, and to assme the cost of and pay for the same, he so agreed upon the belief and understanding that said false work had been
17 prepared of good and sufficient material and in a good and workmanlike manner, and of sufficient strength and durability to answer the purpose for which the same were designed, but it was then and there a fact that through the negligence of defendant and its servants the same were so defective in material, design, and construction as to fail in part to serve the purpose for which they were designed, and plaintiff was by reason thereof subjected to loss and expense in

the sum of one hundred and fifty dollars. To the loss, injury, and damage of plaintiff in the sum of twenty-five hundred dollars.

Plaintiff further says that he has received from defendant the sum of five thousand seven hundred and twenty-nine and $\frac{40}{100}$ dollars ($5,729.40), and no more, which is applicable as a credit upon the aggregate sum herein alleged to be due from defendant to plaintiff.

The items of said credit are:

1877.			
Dec. 15th.		Mitchell & Rowland, lumber bill	$381 69
1878.			
Jan'y 20.		Cash	50 00
Feb'y 19.		"	550 00
" 20.		" paid McNelley	218 75
M'ch 19.		"	700 00
Apr. 20.		"	75 00
"	29.	"	500 00
18 May	9.	Cash	8700 00
" "		" P'd Tracy, lumber bill	34 30
" "		" St. John & Buck, pile-drivers	39 00
" 20.		Cash	653 41
" "		" McNelley, pile-driving	360 00
June 22.		Cash	1,417 15
July 6, '78.		Cash	248 95
" " "		Harding House bill	41 15
" 8, "		Cash to McNelley	60 00
		Total credit	5,729 40

Thus leaving a balance of three thousand six hundred ninety-three $\frac{78}{100}$ dollars due from defendant to plaintiff, for which plaintiff asks judgment, with interest from July 15th, A. D. 1878, against defendant, and also for other proper relief.

LEE & BROWN,
Att'ys for Plaintiff.

STATE OF OHIO,
Lucas County, ss:

Thomas H. Hamilton, being first duly sworn, deposes and says that the facts contained in the foregoing petition are true, as he verily believes.

T. H. HAMILTON.

Sworn to before me and subscribed in my presence this 17th day of July, A. D. 1878.

REYNOLD KINKADE, [SEAL.]
Notary Public, Lucas County, Ohio.

19 On the 17th day of July, 1878, there was filed in said court an affidavit for attachment in the above-entitled cause, which affidavit is in the words and figures as follows, to wit:

Court of common pleas of Lucas County, Ohio.

THOMAS H. HAMILTON, PLAINTIFF,
against
THE KELLOGG BRIDGE COMPANY, DEFENDANT.

STATE OF OHIO,
Lucas County, ss:

The plaintiff, Thomas H. Hamilton, being duly sworn, says:

That this action is brought to recover of the Kellogg Bridge Company a balance due to plaintiff for the erection of a certain iron bridge for defendant, in which plaintiff claims as the contract price $4,003 00
Materials furnished by plaintiff, at request of defendant ... 845 18
Extra work done by plaintiff, at request of defendant 2,875 00
Loss, damage, expense, &c., to plaintiff by reason of breach by defendant of contract with plaintiff for the erection of said bridge 2,500 00
Making the total amount claimed by plaintiff nine thousand four hundred and twenty-three dollars, and upon this sum the defendant has a credit in the sum of five thousand seven hundred twenty-nine & $\frac{40}{100}$ dollars, leaving the aforesaid balance of 3,693 78

That said sum is justly due and owing from the defendant to the plaintiff, and affiant believes he ought to recover of defendant said sum of $, with interest thereon from July 15th, 1878.

That said Kellogg Bridge Company is a body corporate under and pursuant to the laws of the State of New York, and having its principal business office at the city of Buffalo, in the State of New York.

That the Lake Shore and Michigan Southern Railroad Company, a railroad co. organized under and pursuant to the laws of Ohio, with its railway running through the county of Lucas and State of Ohio, has property in its possession and under its control belonging to said Kellogg Bridge Company, and is indebted unto said Kellogg Bridge Company in a large sum, all of which property and indebtedness are liable under the law to be taken and applied in payment of said balance in favor of said plaintiff. And further saith not.

T. H. HAMILTON.

Sworn to before me and subscribed in my presence the 17th day of July, A. D. 1878.

[SEAL.]

REYNOLD R. KINKADE,
Notary Public, Lucas County, Ohio.

Endorsed on said petition and filed therewith is a præcipe, which præcipe is in the words and figures as follows, to wit:

Court of common pleas, Lucas County, Ohio.

THOMAS H. HAMILTON, PLAINTIFF,
vs.
THE KELLOGG BRIDGE COMPANY, DEFENDANT.

Clerk issue summons and order of attachment with notice of gar-
Clerk issue summons and order of attachment with notice of gar-

nishment to the Lake Shore & Michigan Southern Railroad Company to sheriff of Lucas County, Ohio, returnable according to law. Am't claimed $3,693.78, with int. thereon from the 15th day of July, A. D. 1878.

LEE & BROWN,
Att'ys for Plaintiff.

Thereupon a summons and order of attachment in said cause was issued by the clerk of said court, which summons is in the words and figures as follows, to wit:

STATE OF OHIO,
Lucas County, ss:

To the sheriff of Lucas County:

22 You are commanded to notify The Kellogg Bridge Company that it has been sued by Thomas H. Hamilton in the court of common pleas of Lucas County, and that unless it answers by the 17th day of August, A. D. 1878, the petition of the said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 29th day of July, A. D. 1878.

Witness M. J. Enright, clerk of said court, and the seal thereof, at Toledo, this 17th day of July, A. D. 1878.

[SEAL.] M. J. ENRIGHT, *Clerk*,
By M. V. FISK, *Dep. Clk.*

Said order of attachment is in the words and figures as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

To the sheriff of Lucas County, greeting:

You are hereby commanded to attach & safely keep the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects, in your county, of The Kellogg Bridge Company, not exempt by law from being applied to the payment of the claim of the
23 plaintiff, Thomas H. Hamilton, or so much thereof as will satisfy plaintiff's claim for three thousand six hundred ninety-three and $\frac{78}{100}$ dollars ($3,693.78), with int. thereon from July 15th, A. D. 1878, and also for fifty dollars, the probable costs of this action.

And that you make due return of this order on the 29th day of July, A. D. 1878.

Witness M. J. Enright, clerk of the court of common pleas of said county of Lucas, this 17th day of July, A. D. 1878.

[SEAL.] M. J. ENRIGHT, *Clerk*,
By M. V. FISK, *Dep. Clk.*

On the 22nd day of July, 1878, said summons was filed, with the sheriff's return thereon written as follows, to wit:

Received this writ July 17th, 1878. The within defendant, The Kellogg Bridge Company, is not found in Lucas County.

S. S. LINTON, *Sheriff*,
By L. A. CAMPBELL, *Dep'y.*

On the 22nd day of July, 1878, said order of attachment was filed, with the sheriff's return thereon written as follows, to wit:

24 OFFICE SHERIFF LUCAS COUNTY, OHIO.
Toledo, July 22d, A. D. 1878.

Received this order on the 17th day of July, A. D. 1878, and agreeably to the command thereof I did, on the 17th day of July, A. D. 1878, notify the Lake Shore & Michigan Southern Railroad Company as garnishee, not being able to find the president or other chief officer of said co., by leaving a true & certified copy of this writ, together with notice for it to appear in the court of common pleas of this county on the 29th day of July, 1878, to answer as to any property or credits of the within-named defendant, The Kellogg Bridge Company, in its possession or under its control, at the office of James E. Curtis, sup't of said co.

S. S. LINTON, *Sheriff.*
By L. A. CAMPBELL, *Deputy.*

On the 12th day of August, 1878, there was filed in said cause an undertaking for discharge of attachment, which undertaking is in words and figures as follows, to wit:

Court of common pleas, Lucas County.

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY. } 17736.

25 Whereas Thomas H. Hamilton, the plaintiff in the above-entitled civil action for the recovery of money, caused an attachment against the property of the defendant, The Kellogg Bridge Company, to be issued, and the Lake Shore and Michigan Southern Railway Company, debtors of said defendant, to be garnisheed for the amount of said plaintiff's claim, as stated in his affidavit, to wit, for $3,693.78, with the interest thereon from July 15th, A. D. 1878; and whereas the said defendant is desirous of having the said attachment & garnishee discharged:

Now, therefore, we, the said Kellogg Bridge Company, Charles Kellogg, C. V. N. Kittridge, Rufus L. Howard, and George Beals, of Buffalo, New York, and Joseph Paige, of Toledo, Lucas County, Ohio, do hereby bind ourselves unto the said plaintiff, Thomas H. Hamilton, in the sum of seven thousand & four hundred dollars that the said defendant, The Kellogg Bridge Company, shall perform the judgment of the court.

Witness our hands this 27th day of July, A. D. 1878.

KELLOGG BRIDGE CO.,
[SEAL.] By CHARLES KELLOGG, *Pres't.*
26 CHARLES KELLOGG.
C. V. N. KITTRIDGE.
R. L. HOWARD.
GEORGE BEALS.
J. PAIGE.

Attest:
C. V. N. KITTRIDGE, *Sec'y.*

On the 12th day of August, 1878, being the 17th day of the October term of said court, an order was made in said cause, an entry of which appears on the journal of said court in the words and figures as follows, to wit:

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY. } No. 422. 17736.

This day came R. & E. T. Waite, attorneys, and presented to the court an undertaking executed to the plaintiff by the defendant, with Charles Kellogg, C. N. V. Kittridge, R. L. Howard, and George Beals, of Buffalo, New York, and Joseph Paige, a resident of this county, as sureties, in the sum of $7,400.00, double the amount of the plaintiff's claim, as stated in his affidavit, to the effect that the said defendant shall perform the judgment of the court in this action; and on motion of said attorneys the undertaking, with said sureties, is approved by the court, and ordered to be filed with the clerk.

27 And it is also ordered that the attachment issued in this action be discharged and restitution made of the property taken under it, and that the garnishee, the Lake Shore and Michigan Southern Railway Company, be also discharged from any liability in this action for any property of the defendant in its hands.

On the 2nd day of Dec., 1878, said defendant, by its attorneys filed in said court its petition for removal to U. S. cir. court, which petition is in words and figures as follows, to wit:

Petition for removal to the circuit court of the United States for the western division of the northern district of Ohio.

Court of common pleas, Lucas County, Ohio.

THOMAS H. HAMILTON, PLAINTIFF,
vs.
THE KELLOGG BRIDGE COMPANY, DEFENDANT. } No. 17736.

To said court of common pleas:

Your petitioner, The Kellogg Bridge Company, respectively shows to this honorable court that Thomas H. Hamilton, the plaintiff in the above-entitled suit, was, at the commencement of said suit, and still is, a citizen of the State of Ohio, and that your petitioner, the defendant

28 in said suit, was then, and still is, a corporation created by the laws of the State of New York.

That the amount in dispute in said suit, exclusive of costs, exceeds the sum or value of five hundred dollars.

And that your petitioner desires to remove said suit for trial into the circuit court of the United States for the western division of the northern district of Ohio.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against it and of all pleadings, depositions, testimony, and other proceedings in the cause.

Your petitioner therefore prays this honorable court to accept said surety, and to make an order for the removal of said suit into said

circuit court of the United States and to proceed no further in the cause against your petitioner, and your petitioner will ever pray, &c.

R. & E. T. WAITE,
Attorneys for Petitioner.

TOLEDO, O., *Dec. 2nd*, 1878.

On the 2nd day of Dec., 1878, there was filed in said court an undertaking in the above-entitled cause, which undertaking is in the words and figures as follows, to wit:

29 Know all men by these presents that we, Joel M. Gloyd & Richard Waite, as sureties for the Kellogg Bridge Company, are held and firmly bound unto Thomas H. Hamilton in the penal sum of two hundred and fifty dollars, the payment whereof well and truly to be made unto the said Thomas H. Hamilton, his heirs and assigns, we bind ourselves, our heirs, representative, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: That said Kellogg Bridge Company having petitioned the court of common pleas of Lucas County, State of Ohio, for the removal of a certain cause wherein the said Thomas H. Hamilton is plaintiff, and the said Kellogg Bridge Company is defendant, into the circuit court of the United States for the western division of the northern district of Ohio:

Now, if the said Kellogg Bridge Company shall enter in said circuit court on the first day of its next session copies of all process against it and of all proceedings, depositions, testimony, and other proceedings in the said cause, then this obligation to be void; otherwise, in full force and virtue.

Witness our hands and seals this 2nd day of December, A. D. 1878.

J. M. GLOYD. [SEAL.]
RICH'D WAITE. [SEAL.]

30 On the 2nd day of Dec., 1878, being the 37th day of the October term of said court, an order was made in said court, an entry of which appears on the journals of said court, in the words & figures as follows, to wit:

THOMAS H. HAMILTON
vs. } 17736.
THE KELLOGG BRIDGE COMPANY.

The Kellogg Bridge Company, the defendant in this suit, having filed herein in this court, at the time of entering his appearance in this court, his petition for the removal of this suit for trial into the circuit court of the United States for the western division of the northern district of Ohio, and having at the same time offered in this court good and sufficient surety for his entering in such circuit court on the first day of its session copies of the process against it, and of all pleadings, depositions, testimony, and other proceedings in the cause, and it appearing to the satisfaction of this court that the amount in dispute in this suit, exclusive of costs, exceeds the sum or value of five hundred dollars, and that the suit is by a citizen of this State against a citizen of the State of New York, and that the defendant is entitled to such removal,

31 the court do hereby ac cept the said surety, and order that this said suit be removed for trial into the said circuit court, and that this court proceed no further in the cause against the said petitioner.

And afterwards, to wit, on the 9th day of May, A. D. 1879, there was filed in said court the following answer:

32 *Answer.*

United States circuit court for the northern district of Ohio, western division.

THOMAS N. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY.

I. The defendant, The Kellogg Bridge Company, for answer to the petition of the plaintiff says that the only contract between said plaintiff & defendant, for the erection by plaintiff for defendant of the bridge referred to in said petition, was in writing, & the following is a true copy of said contract, viz:

"Agreement made this 15th day of December, 1877, between T. N. Hamilton, of Toledo, Ohio, of the first part, and The Kellogg Bridge Company, of Buffalo, N. Y., of the second part, witnesseth:

"That the said party of the first part hereby agrees to furnish and prepare all necessary false work and erect the iron bridge now being constructed by the said party of the second part for the Lake Shore and Michigan Southern R. R. Co. at Toledo, Ohio, over the Maumee River, receiving said bridge material as it arrives on the cars at the site of said bridge and erecting the same in the best manner, according to the design of said bridge and the directions of said second party, from time to time, commencing the erection of said work when required to do so by said second party, and proceeding with the same with a force
33 sufficient to complete the entire work on or before the first day of March next; the said first party also agrees to assume and *and* pay for all work done and materials furnished up to the time of executing this contract, including piling & piles, timber, & other materials and labor done on the same, but not including bolts and washers which have been furnished by the party of the second part, but to return said bolts and *m*ashers to the said second party or pay for the same on completion of the said bridge.

"And the said first party in consideration of the payments hereinafter mentioned, to be made by said second party, agrees to perform all the stipulations of this agreement in a thorough and workmanlike manner and to the satisfaction of the second party.

"And if at any time the said second party is not satisfied with the manner of performing the work herein described, or the rapidity with which it is being done, the second party shall have full power and liberty to put on such force as may be necessary to complete the work within the time named, and provide such tools or materials for false work as may be necessary, and charge the cost of the same to the said first party, who agrees to pay therefor.

"In consideration of the faithful performance of all the stipulations as hereinafter mentioned to be performed by the first party, the second party hereby agrees to pay the first party the sum of four thou-
34 sand and three dollars (4,003), in manner following: On completion of the first span, nine hundred dollars (900); on completion of the second span, nine hundred dollars (900); the third span, eight hundred dollars (800), and on completion of the draw and the entire work, fourteen hundred and three dollars (1,403), but payments in each

and all cases to be made only on the acceptance of each part of the work by the chief engineer of the L. S. & M. S. R. R. Co. on the 15th day of each month after such acceptance.

"Witness our signatures and seals the 28th day of December, 1877.

"L. N. HAMILTON. [SEAL.]

[SEAL OF K. B. CO.] "CHAS. KELLOGG,

"*Pres't Kellogg Bridge Co.*

"Attest:

"C. V. N. KITTRIDGE, *Sec'y.*"

II. And said defendant, for a further answer to the first cause of action in said petition stated, denies that the failure of the plaintiff to complete the erection of said bridge by the first day of March, A. D. 1878, was wholly owing to the neglect and failure of defendant to provide in time the necessary materials therefor duly and properly fitted for putting up, or that said work of plaintiff was in all respects done to the satisfaction of defendant; but defendant avers that the failure to so complete said bridge was owing to the fault and neglect of plaintiff in not properly prosecuting his part of the work to be done under said contract, and that the defendant furnished him from
35 time to time the necessary materials on their part to be furnished, & at the proper place, & in the proper manner required of them, as fast as he was able to receive and use the same, and that said plaintiff did not proceed in his said work with a force sufficient to complete the same within the time specified.

III. And said defendant, for a further answer to the second cause of action in said petition stated, denies that said plaintiff was compelled to or, at the request of the defendant, did procure and pay for the materials, or pay the bills mentioned therein, or that such materials should have been provided & paid for, or said bills paid by defendant; and also denies that plaintiff is entitled to have & recover of defendant, or that there is due and owing from defendant to plaintiff, any sum whatever therefor.

IV. And, for a further answer to the third cause of action in said petition stated, defendant denies that when said materials were received by plaintiff they were, in size or workmanship, fitting or material, defective or unsuited for their purpose or design, or that plaintiff did, at the request of defendant to properly prepare or fit or adapt the same to the uses designed for the same by defendant, bestow or expend any amount of work or labor in shaping, fitting, or adapting the same to the purposes of said bridge, or that any sum is due and
36 owing from defendant to plaintiff therefor; but defendant avers that any such work or labor expended by plaintiff on said materials was rendered necessary by his own fault & neglect in not properly managing and prosecuting the work to be performed by him under said contract.

V. And for a further answer to the fourth cause of action in said petition stated, defendant denies that it failed or neglected to do or perform any of its obligations under said contract, or that, by reason of any failure or neglect on the part of defendant, said plaintiff was prevented from finishing said bridge by said March 1st, A. D. 1878; or that, by reason of any failure or neglect of defendant, said plaintiff was compelled to give his own time and attention to said work, or the use of his tools or appliances for any time beyond said March 1st; or that said plaintiff was, by reason of any fault or neglect of defendant, sub-

jected to any loss of time of himself & his employees, or any unavoidable loss or extra expenses in or about the erection or maintenance of the necessary false work, piles or piling for the putting up of said bridge. And defendant denies all other allegations in said petition inconsistent with any of the averments herein.

VI. And said defendant further answering, & by way of a counter-claim to the several claims of plaintiff, says that, not being sat-
37 isfied with the manner in which plaintiff was performing his said work, or the rapidity with which it was being done by him, it, with the knowledge, acquiescence, and approval of plaintiff, put on an extra force of men, and provided such tools and materials as were necessary to complete said work sooner than the plaintiff would otherwise have completed the same, and charged the cost and expense of such labor & materials to the plaintiff, the items of which appear in the account hereto annexed, as hereinafter stated.

That said plaintiff did not return all of the washers and bolts which were furnished him by defendant, to the value of $67.00, nor all of the small tools of defendant, which were also furnished to & used by him in the prosecution of his said work, to the value of $200.

That the statement of account hereto annexed & made part hereof contains all of the several items of account of defendant against plaintiff in connection with said contract & the work on said bridge, and that there is due said defendant from said plaintiff on account thereof the balance of six thousand six hundred and nineteen $\frac{70}{100}$ dollars ($6,619.70), with the interest thereon from July 8th, A. D. 1878.

Wherefore said defendant asks for a judgment against plaint-
38 iff for said sum of six thousand six hundred & nineteen $\frac{70}{100}$ dollars ($6,619.70), with the interest thereon from July 8th, 1878.

R. & E. T. WAITE,
Att'ys for Def't.

STATE OF OHIO,
Lucas County, ss:

Richard Waite, being duly sworn, says he is one of the attorneys for the defendant in this action; that said defendant is a corporation, and that he believes the facts stated in the foregoing answer of the defendant to be true.

RICH'D WAITE.

Sworn to before me & signed in my presence this May 8, 1879.

CHAS. G. WILSON,
Notary Public, Lucas Co., Ohio.

39 *Mr. Thomas N. Hamilton to the Kellogg Bridge Company, Dr.*

1877.					
Dec.	6.	To paid Mitchell & Rowland Lumber Co			381 69
1878.					
Feb.	8.	"	"	you draft on New York	50 08
"	20.	"	"	Jas. McNelly, driving piles	218 75
"	"	"	"	you cash	550 00
M'ch	19.	"	"	draft on New York	700 00
Apr.	22.	"	"	cash	75 00
"	27.	"	"	draft on New York	500 00
May	9.	"	"	Tracy Bros. bill, lumber	34 30
"	"	"	"	St. John, Buck & Co., use pile-machine	39 00
"	"	"	"	you cash	700 00
"	21.	"	"	" "	653 41
June	27.	"	"	" "	1,415 92
"	"	"	"	Harding's board bill for you	41 15

July	6.	"	"	you cash	248 95
"	8.	"	"	J. McNelly's bill, driving piles	60 00
		"	"	" " " " "	75 00
		"	"	Wethey, 89 days' work, M'ch & June inc., $1.90	169 10
		"	"	Martin, 65½ " " Apr. to June " $1.20	137 55
		"	"	Bannister, 65½ " " " " " $1.85	121 17
		"	"	Rhinehander, 27 " " M'ch to Apr. " $2.65	71 55
		"	"	Lyons, 38½ " " May & June " 2.50	96 25
		"	"	keepers 2 months, Dec. & Jan	300 00
		"	"	L. S. & M. S. R'y Co., labor, taking iron out of river, as follows:	
				210 days' work of men in Apr. with foreman	414 49
				⅞ month, Reid " "	138 88
				176 days' work of men in May " "	366 00
				1 month's, Reid's, time in May	208 33
				" " " " June	208 33
				63½ days' work of men in June " "	145 48
				Am't carried forward	8,120 30
40				Am't bro't forward	8,120 30
				To paid Wilcox's bill for use scows 40 d'ys, $5	200 00
		"	"	60 piles lost, $5	300 00
		"	"	46 res. pine timber, 7x14x44 ft., 16,530', $20	330 60
		"	"	drivers for 24½ days @ $25.00	612 50
		"	"	labor repairing bridge material at shops after it was taken from river, viz:	
				labor top chords, 7 days' work	19 45
				" 9 posts, 3 men 12 days, riveters, $2.00	72 00
				" 9 struts, 3 " 4 " " " "	24 00
				" 18 laterals, 1 " 2 " bolt-cutting, $3.50	7 00
				" 55 eye-bars, 4 " 8 " straightening, $2.00	64 00
				" 8 knee-braces, 3 " ½ " punching, $3.50	5 25
				" " 6 " ½ " riveters, $2.00	6 00
				" 7 pins, 1 " 4 " lathe, $5.00	20 00
				common laborers on same, 6 men 12 d'ys, $1.50	108 00
				blacksmith-work " " " " " " $3.00	216 00
				6,400 lbs. new eye-bars @ 4c	256 00
		"	"	small tools not returned	200 00
		"	"	1,690 bolts & washers not returned, 4c	67 60
					$10,628 70

Cr.

Apr.	23.	By paid Rhinelander		6 00	
		" amount contract price		$1,003 00	
					4,009 00
		Balance due K. B. Co			$6,619 70

And afterwards, to wit, on the 16th day of June, A. D. 1879, there was filed in said court the following reply:

41 Circuit court of the United States for western division of N. D. of Ohio.

THOMAS H. HAMILTON, PL'FF,
vs.
THE KELLOGG BRIDGE COMPANY, DEFENDANT.

Reply.

The plaintiff now comes, and in reply to the answer of the defendant says:

I. That he denies, as is averred in the ground of defense, No. 1, that the failure to complete the erection of said bridge by March 1st,

1878, was owing to any fault or neglect of plaintiff; that defendant furnished to plaintiff at the proper times and places the necessary materials, or in proper manner, or as fast as plaintiff could receive the same; also, that plaintiff did not proceed in his said work with a working force sufficient to complete the said bridge within the time required.

II. The he denies, as is alleged in the fourth ground of defense, that any work or labor expen'ed by plaintiff on said materials was rendered necessary by the fault or neglect of plaintiff in the management or prosecution of the said work.

42 III. That in reply to the answer and the sixth ground therein, and to the counter-claim therein set for', plaintiff, says: That it is not true, and he denies, that defendant at any time became or was dissatisfied with the manner or rapidity of plaintiff in erecting said bridge, or that there at any time was any reason for such dissatisfaction, or that on account thereof, or with the knowledge or acquiescence of plaintiff, did the defendant put on an extra force of men or provide tools or materials to do, nor did such or any extra force of men do or perform any work by plaintiff to be performed, nor that the said annexed account thereof *his* true or correct or any part thereof.

That he denies that he failed to return all of the bolts and *mashers* used in the erection of said bridge which had been furnished by defendant to the value of $67.00, or any other sum, or that he failed to return small tools of defendant in the sum of two hundred dollars, or any other sum whatever.

That plaintiff denies each and all of the items of account in the counter-claim of defendant contained and not appearing to the credit of defendant in plaintiff's petition.

43 That he denies that there is the sum of six thousand six hundred nineteen & $\frac{70}{100}$ dollars ($6,619.70) or any other sum due from plaintiff to defendant.

Whereupon he prays judgment as in his petition.

LEE AND BROWN,
Att'ys for Pl'ff.

STATE OF OHIO,
Lucas Co., N. D. O., W. D.:

The plaintiff, Thomas H. Hamilton, being duly sworn, says that he believes the facts contained in the foregoing reply are true.

T. H. HAMILTON.

Sworn to before me and subscribed in my presence this 14th day of June, 1879.

O. T. CASE,
U. S. Com. N. D. O.

And afterwards, to wit, on the 3rd day of December, A. D. 1879, being a day of the December term of said court, the following proceedings were had, to wit:

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY. } Law.

44 This day came the parties by their attorneys, and this cause coming on for trial, a jury was called and came, to wit, John

Dye, O. E. Rhodes, William Letcher, George S. Clement, William Clemons, O. C. Ashton, Thomas C. McEwen, Thomas Thorpe, M. Van Fleet, William Waldorf, Thomas D. Harris, Jeremiah Atwater, who were duly empanneled, and sworn the truth to speak upon the issues joined between the parties hereto, and the evidence being commenced but not concluded, the further trial of this cause is adjourned until to-morrow morning.

And the trial of said cause was continued from day to day, and on December 12th, 1879, the following proceedings were had, to wit:

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY. } Law.

This day came again the parties by their attorneys, and also came the jurors of the jury hereinbefore impanneled and sworn, and the arguments of counsel having been concluded after receiving the charge of the court, the jurors aforesaid, upon their oaths aforesaid, returned into court their verdict in writing in the words and figures following, to wit: "We, the jury in this case, being duly impanneled and sworn, do find for the plaintiff, and assess his damages to the sum of three thousand thirty-nine dollars and eighty-nine cents.

Motion.

United States circuit court for the western division of the northern district of Ohio.

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY.

The defendant, The Kellogg Bridge Company, comes and moves the court to vacate the verdict of the jury rendered in this cause on December 12th, 1879, and to grant a new trial, for the following reasons:

1st. The court erred in admitting the testimony in behalf of the plaintiff, objected to by the defendant at the time.

2nd. The court erred in overruling the motion of the defendant to rule out from the consideration of the jury the testimony on the part of the plaintiff which had been by the court admitted against the objection of the defendant, and to which the defendant objected at the time.

3rd. That the court erred in denying the request of defendant after the evidence was concluded, and before the argument to them, for the court to instruct the jury upon the matters of law involved in the issues.

4th. That the court erred in denying the request of the defendant, after the evidence was concluded and before any argument to them, for the court to instruct the jury upon the propositions of law presented by defendant.

5th. That the court erred in giving in charge to the jury each of the several propositions of law as requested by the defendant.

6th. That the court erred in its charge to the jury, as given, in the several matters excepted to by the defendant at the time.

7th. That the damages awarded the plaintiff are excessive, appearing to have been given under the influence of prejudice.

8th. That the said verdict is not sustained by sufficient evidence.

9th. That the said verdict is contrary to law.

10th. For errors of law occur'ing at the trial and excepted to by the defendant.

Toledo, O., Dec. 13th, 1879.

R. & E. T. WAITE,
KENT, NEWTON & PUGSLEY,
Att'ys for Def't.

47 And afterwards, to wit, on the 19th day of December, A. D. 1879, being a day of the December term, 1879, of said court, the following order was entered, to wit:

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY. } Law.

This day came the parties, and thereupon there came on and was heard the motion of the defendant to set aside the verdict of the jury and for a new trial, and after argument of counsel, and being fully advised, the court overruled said motion, to which order and judgment of the court the defendant excepted; and thereupon, on motion of the plaintiff for judgment on the verdict, it is considered and adjudged by the court that the plaintiff recover of the defendant the sum of three thousand thirty-nine and $\frac{84}{100}$ dollars ($3,039.84) and the costs herein taxed at $, and in default of payment that execution issue; to which judgment the defendant then and there excepted, and thereupon the defendant tendered to the court its bill of exceptions herein,
48 which is allowed, signed, sealed, and ordered to be made a part of the record of this court.

48½ And afterwards, to wit, on the 20th day of December, A. D. 1879, there was filed in said court a bill of exceptions in the words and figures following, to wit:

49 Circuit court of the United States for the western division of the northern district of Ohio.

THOMAS H. HAMILTON
vs.
THE KELLOGG BRIDGE COMPANY. }

Bill of exceptions.

Be it remembered, that upon the trial of this cause, begun and held in the circuit court of the United States for the western division of the northern district of Ohio, on the third day of December, A. D. 1879, before his honor Martin Welker, district judge for said district, sitting in circuit court, the plaintiff, Thomas H. Hamilton, to maintain the issues on his part, gave in evidence to the jury testimony tending to prove that the bridge to be erected by him under the contract referred to in his petition, and which was admitted to be the same contract set out in the answer of the defendant, consisted of three independent fixed spans, each one hundred and seventy-five feet six inches long,

suspended between and resting at each end of the span upon stone piers, which had been then prepared to receive the same, and one draw span of one hundred and eighty-five feet in length, resting upon a
50 pier in the centre, also then prepared; that said fixed spans were each of the same character and construction; that for the purpose of erecting each of said spans it was necessary to build and use what was termed false work, which consisted of a platform resting on piles driven in the river, and between the piers on which the span to be erected rested; and that prior to the making of the contract with the plaintiff the defendant had commenced to construct such false work preparatory to the erection itself of said bridge, by driving a portion of the piles and laying some of the necessary timbers thereon which included all of the piles for the first and second spans; and then offered to further give in evidence certain testimony to prove that plaintiff did, in fact, assume the cost of and pay for said false work; and that a portion of the piling which had been so driven by the defendant prior to the execution of said contract, and which, by the terms of said contract, plaintiff had agreed to assume and pay for, was insufficient for the purpose and improperly done, and that plaintiff had no knowledge of such insufficiency or imperfection.

The defendant objected to the introduction of such testimony, but the court overruled such objection, to which ruling the defendant, at the time, excepted.

51 Thereupon the plaintiff proceeded to, and did, give in evidence to the jury testimony tending to prove that certain of the piles so driven by the defendant for the two spans first to be erected were not driven sufficiently deep to sustain in certain parts the weight of the material for said span, after such material had been put in position and before the several parts thereof had been so coupled together as to enable the span to sustain itself on the piers, independent of said false work; and that the fact of such piling being insufficient was not known to plaintiff at the time he made said contract, and was not apparent upon any examination he then made or could make of said work, and was not discovered or discoverable until, during the progress of the erection of said bridge, the same should be tested.

But plaintiff did not claim, and offered no testimony, that the defendant had at any time made any statement or representation as to the nature or character of the work which had been done by it on said false work. The plaintiff also gave evidence tending to prove that a part of the false work or scaffolding sunk under the weight of the first span, and that he suffered damages by reason thereof, as set forth in his cause of action.

And plaintiff further offered to prove that during the progress
52 of the erection of said bridge he was subjected to extra costs and expense in remedying the alleged insufficiency of the piling which had been done by the defendant, and also was delayed thereby in the completion of said bridge beyond the 1st of March, 1878. To the introduction of said testimony the defendant objected, but the court overruled such objection, to which ruling the defendant at the time excepted. Thereupon the plaintiff proceeded to and did give in evidence to the jury testimony tending to prove as was offered.

The plaintiff also gave evidence tending to prove that on December 15th, 1877, he made with the defendant the contract for the erection of said bridge, but the written contract was not, in fact, signed until December 28th, 1877; and that with the consent of defendant, plaintiff, at once, after December 15th, entered upon the fulfillment of said con-

tract; and defendant promised to provide him with the necessary material within eight or ten days thereafter; and that plaintiff did forthwith begin and continue in and was ready to push forward his work.

And the plaintiff, further to maintain the issue on his part, gave in evidence to the jury testimony tending to prove that after the second fixed span to be erected was about two-thirds completed, and on
53 the 22nd day of February, A. D. 1878, the ice, which had before that time formed by the river, broke up in consequence of and was carried out by a flood which then occurred, and carried away the false work under this span and caused the whole of the iron material then in place in the span, or on the span in place and ready to be put in place, to fall into and sink to the bottom of the river, which was at this place about 16 feet deep, and also evidence tending to show all the circumstances of the falling of said span, and thereupon proposed to offer further testimony to prove that if the piles driven by the defendant prior to the execution of said contract had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood, and the span would not have fallen into the river, and that in consequence of such falling of the span he was subjected to extra and increased expense and delay in the re-erection of said span with the material originally intended for the third of said fixed spans, and in the erection of said bridge, and in the replacing of the false work also carried away. To the introduction of which testimony the defendant objected, but the court overruled said objection, to which ruling the defendant at the time excepted. And thereupon the
54 plaintiff proceeded to and did introduce further testimony tending to prove as was proposed.

And said plaintiff, to further maintain the issues on his part and his claim for damages, offered to prove that after the 1st day of March, 1878, and while engaged in the erection of said bridge, a heavy gust of wind blew down a certain appliance called a "traveler," used by him in the work of erecting said bridge, and injured said "traveler."

To the introduction of which testimony the defendant objected, but the court overruled such objection, to which ruling the defendant at the time excepted. And thereupon the plaintiff proceeded to and did offer further testimony tending to prove as aforesaid and the amount of damage sustained, to wit, $185 by him in consequence thereof; which testimony was by the court allowed to be given, subject to further consideration by the court and objection by the defendant, subject also to instructions in the charge to the jury. To which the defendant also objected.

And the plaintiff, further to maintain the issue on his part, gave in evidence to the jury testimony tending to prove that the defendant did not deliver him the iron necessary to enable him to commence the erection of said bridge until some time in the month of January,
55 1878, and after he was ready to commence with the work, and that such delay contributed to prevent plaintiff from completing the erection of all of said bridge by the 1st day of March, 1878, and that by reason of such delay in the completion of said bridge he was subjected to additional cost and expense.

And also gave evidence to the jury tending to prove that if said material had not been delayed he would have so far completed said second span as to have enabled it to rest on the piers therefor independent of the support of the false work, and thereby have escaped the injury from the flood.

And be it further remembered that upon the conclusion of the test-

mony-in-chief in behalf of the plaintiff, and before it had offered any testimony in its behalf, the defendant moved the court to rule out from consideration by the jury all testimony offered by the plaintiff on the following points:

1st. All testimony as to the insufficiency of the false work, so called, when the plaintiff took charge of the work under his contract with the defendant.

2nd. All testimony as to any cost or expense which the plaintiff was put to in consequence of the said false work not having been
56 properly constructed or of sufficient strength to support the bridge or to resist the force of the ice and flood.

3rd. All testimony as to damage or cost occasioned by the falling of any part of the bridge on account of flood in the river, whether the said damage and cost were in rebuilding said fallen part of said bridge or in the extra expense on account of delay in erecting other parts of the bridge or of replacing any of said false work which had been carried away.

4th. All testimony as to the cost and damage occasioned by the blowing over by the wind or otherwise injuring the "traveler" or any other of the implements used by the plaintiff in erecting the bridge.

But the court refused to grant such motion and to rule out any part of said testimony, to which ruling the defendant also at the time excepted.

And thereupon the defendant, to maintain the issues on its part, gave in evidence to the jury testimony tending to prove, among other things, that the defendant did not require the plaintiff to proceed with the erection of said bridge until it was able to deliver him the iron therefor as fast as he could receive and put the same into place in said bridge; and that prior to the time when it did require the plaintiff to commence the erection of the bridge he was
57 not subjected to any extra expense in consequence of any delay in commencing such delivery. And the defendant also gave in evidence to the jury testimony tending to prove that the plaintiff having neglected to remove from the river the iron of the second span, which had fallen into the river at the time the false work for this span was carried away by the ice and flood, it caused such iron to be removed at its own expense; that the iron materials originally intended for the first fixed span were used by the plaintiff in the re-erection of of the second span, and the iron removed from the river and repaired by the defendant at its own expense was, together with the remaining parts originally intended for the said second span, used by the plaintiff in the erection of said third span; that the iron part of said bridge, when completed, was worth no less than $80,000; that the cost of removing said iron from the river, paid by the defendant, was about the sum of $1,940.20; that the cost to defendant of repairing the iron so removed from the river was about the sum of $797.80, and that the items for the cost of such removal and repairs were embraced in the account of defendant against said plaintiff annexed to and which formed a part of its answer therein. And also gave evidence tending to prove that the falling of the second span into the river was not owing
58 to any defect in that portion of the false work done by defendant, but wholly owing to the action of the ice and the flood; and that such flood and breaking up of the ice was liable to happen at any time during the winter, as well as during the early spring, the plaintiff in making his case having given evidence tending to prove that high water in said river was liable to occur every season in the very

last of winter and in the early spring, both when the ice broke up and when there was no ice to break up.

And be it further remembered that after the evidence in behalf of both parties had been concluded, and before any argument to the jury, counsel for the defendant requested the court to instruct the jury in matters of law involved in the action, and also upon the following questions of law claimed by the defendant to be involved in the action, viz:

1st. The defendant in this action is not liable to any damages, cost, or expense occasioned by the insufficiency of the false work, whether that insufficiency was the improper construction or want of strength of its materials.

2nd. That even though they find that said defendant did delay and prolong the execution and completion of the work contracted for in the contract in this action sued upon for an unusual and extraordinary length of time, without necessity or just cause, and the loss of the
59 bridge occurred by a flood in the river while the plaintiff was, after such delay, prosecuing his work under said contract, the defendant would not be liable to the plaintiff for such a loss, & he cannot in this action recover any damage which he may have so sustained.

3rd. That the court direct the jury to find that the plaintiff is not entitled in this action to recover any damage that he may have sustained by reason of the giving out of the second span of said bridge on account of the flood in the river.

But the court refused to instruct or charge the jury in any manner or form until after the argument to them by counsel for both sides had been concluded, to which refusal of the court to so instruct or charge the jury the defendant at the time excepted.

After the argument to the jury on both sides was concluded the counsel for the defendant requested the court to give in charge to the jury the same propositions of law which the court had been requested before the argument to instruct the jury upon, and also requested the court to further charge:

4th. That if the jury found from the evidence that the defendant delayed requiring the plaintiff to commence the erection of said work within a time which would have enabled him to complete the bridge by the 1st of March, 1878, the plaintiff would be entitled to demand
60 an extension of the time equivalent to the delay in the beginning; and that if he was put to no extra expense while waiting for such direction, he would not be entitled to claim damages because of such delay.

5th. And if the jury find from the evidence that the materials for the second span, which fell into the river, had so fallen without any fault of the defendant, and that it would be recovered by the plaintiff at a moderate expense compared with the value of such material, he was bound to so recover such material and place the same in the bridge before he would be entitled to recover of the defendant under the contract for the erection of said span, or the one into which such material was ultimately placed; and that if the defendant, because of the neglect of the plaintiff to do so had to recover such material from the river, it was entitled to have the cost of such removal applied on any amount due from it to the plaintiff under the contract.

But the court refused in manner and form to so charge the jury, and refused to give in charge in manner and form either of the propositions as requested, to which the defendant excepted.

Thereupon the court proceeded to and did charge the jury, after first

reciting to them the issues involved in the case as presented by the pleadings, as follows, to wit:

61 "In order, gentlemen, to enable you to determine the questions of fact that are to be submitted to you, it is necessary that I should settle three or four legal questions that grow out of this contract. By the terms of this contract the defendant was bound to furnish and deliver at the site of the bridge this iron material, and everything necessary for the construction of the bridge. The plaintiff was only to take that material and put it up into place in the bridge, and for that he was entitled to the contract price. Another question that grows out of this contract is in relation to this scaffolding, this false work. One of the grounds of delay and additional expense that is complained of in the suit is that the false work, or what is called the scaffolding, by reason of its defective character, caused a great delay, for which the plaintiff claims he is entitled *he* recover damages in this action, as by the terms of the contract the false work which had been done by the defendant was taken by the plaintiff. It is shown that the defendant itself undertook, by its employés, to erect this bridge, and that they had gone on and driven piles for the false work necessary to erect the first and second spans at the time the plaintiff undertook, in place of the bridge company, to erect this bridge. It is claimed on behalf of the plaintiff that when this contract was made, and when the plaintiff took the work already constructed, that the law raises in his favor an implied

62 warranty that the work already done by the bridge company was done in a workmanlike manner, and suited to the purposes for which it was put in, and to be used by plaintiff.

"The defendant claims that while the plaintiff took the work it took it just as it was, and that the defendant is not responsible to him for any defect there was in it. Now, in the construction of contracts, we look into the circumstances surrounding the parties at the time of the execution of the contract, and give such a fair and reasonable instruction to it as will carry out the intent and purposes of the parties who make the contract. Applying these rules to this contract, I give it to you as a good construction of it, that if the false work already constructed was sold by defendant to plaintiff, this implied warranty necessarily follows this sale; also, that a fair interpretation of its terms would be that the plaintiff was to take all the false work, pay for it, assume the contract made by the bridge company with reference to it, and furnish all the additional false work that might be necessary. Taking these two together, I direct that by the terms of this contract there was an implied warranty on behalf of the defendant that this false work was suitable and proper for the purposes for which it was to be used by the parties. And so, gentlemen, if the evidence shows you

63 that the particular work which was said to be defective was such that the plaintiff could not by examination ascertain its defects (for if they were apparent by mere examination of the false work, it was the duty of the plaintiff to make that good) he has the right to rely upon the implied warranty; that is if the defects were such that they could not be, by ordinary observation and care on behalf of the plaintiff, ascertained and found out.

"Then it is alleged that by reason of the defective character of this false work this plaintiff was delayed in the work necessary for him to perform in putting this bridge together. If you find, gentlemen, from the evidence, that the plaintiff was delayed by the unreasonable and unworkmanlike manner in which the work was done, or incurred additional expense in making that false work suitable, then the plaintiff has

the right to recover for the unreasonable delay occasioned by the defective character of that work. As to the false work put in by the plaintiff, after this contract was executed, the plaintiff took his own risk, and if he failed to finish it suitable for the purpose for which it was designed he has no ground for complaint by reason of any defects in what he was to put in." To all of the foregoing part of the charge the defendant in due time expected, as not being correct in matter of law.

64 And the court further charged the jury as follows, to wit:

"By the terms of this contract the defendant was bound to deliver this material on the cars at the site of the bridge. There is nothing stated as to when it should be delivered, except the general statement in the contract that the bridge was to be completed on the first of March. Now, by this contract, there is an implied contract, which the law forces us to understand, that this material was to be delivered in a reasonable time, so as to keep the plaintiff and his hands employed after the commencement of this work, and not to unnecessarily delay him after the commencement of the contract between the parties.

"It is stated on behalf of the defendant that there is a clause in the contract which gives the defendant the right to notify the plaintiff when he must begin. That is true, but from the other part of the contract, that the bridge must be built by the first of March, it necessarily follows that the notice shall be such that he can comply with it by a fair exercise of mechanical skill in that regard.

"Under this they were not to wait until a short time before the first of March, and then give the notice. As to the question when these parties were to furnish the materials, ascertain from the testimony when the work was to begin; ascertain in the light of the evidence when the plaintiff was allowed to commence the erection of the bridge.

65 "After the commencement of the bridge it was the duty of the defendant to furnish this material as rapidly as it could be furnished, for the purpose of enabling the plaintiff to complete the job by the first of March. If the defendant did not do that, and unreasonably delayed the job, and the plaintiff incurred a large additional expense that he would not have otherwise incurred, then he has the right to recover, in addition to the contract-price, the expense incurred by the delay in the performance of his contract."

To which part of the charge, as given, the defendant duly excepted, as not being correct in matter of law.

And the court then further charged the jury as follows:

"There is another question that has to be settled, which grows out of the flood that took place during the progress of the work. The evidence shows that the second span went down by reason of the flood, or, as it was claimed by the plaintiff, by reason of the defective false work put in by the defendant for the second span.

"Upon this I direct you, that whatever injury was occasioned to the plaintiff by the flood, or by winds merely, or by no fault of the defendant, happening even after the delay by the defendant in furnishing the materials, the damage is not proximate, but remote, and the

66 plaintiff cannot recover for such expense or delay as may have been occasioned by the flood alone. If the fall of the bridge was occasioned by the improper construction of the false work exclusively, then the injury did not result from the freshet that carried it off; and if that happened by reason of the defective character of the false work the damages would not be remote, and the plaintiff would be entitled

to recover. This is what is substantially claimed by counsel on the part of defendant, but I have put it in different language.

"If you find that the fall of the bridge was occasioned by the defective character of the false work, and the damages resulting to the plaintiff occasioned by the flood on the 22nd of February was by reason of this defective work, then the plaintiff is entitled to recover. It will be important for you in applying these general principles in this case to ascertain from the proof what was the cause of that span falling down. That will necessarily require an examination into the character of this false work and the driving of these piles. Ascertain whether in doing that the defendant exercised proper care and workmanship. In that matter, in order to be absolutely insured of the safety of that scaffolding or false work, they must exercise care and diligence in the
67 workmanship and construction of it. If the delay was occasioned without any fault of the defendant, and occasioned simply by the flood, it was one of those accidents that the plaintiff necessarily ran the risk of in contracting for the construction of the bridge. It was the fault of nobody; it was the fault of nature—causes growing out of a higher power. It is claimed that it being so liable to rain at this time of the year, and to carry out the ice with the floods, that the work was prolonged by the delay in furnishing materials, and had not sufficiently progressed to prevent the span being carried off. As to this I direct you to ascertain whether the span fell down by reason of the imperfect and defective character of the false work, and if so, then the delay which may have been occasioned to this plaintiff by reason of the defective scaffolding is to be charged against the defendant, and to be considered in the verdict."

To which probable charge, as given, the defendant excepted.

And the court further charged the jury as follows:

"The defendant, by way of counterclaim, claims that it is entitled to recover the expenses incurred and the labor performed upon that part of the bridge that fell into the river by the freshet on the 22nd of February, 1878. It appears in evidence that this plaintiff did not undertake to recover any part of that bridge, and that the
68 defendant employed some one to take out the iron that fell into the river, and that it took the particular iron to its manufactory and worked it over and brought it back, and plaintiff put it into the third span, the material for the third span in the meantime being by common consent put into the second span.

"This is an important question, and it is necessary for the court to settle it for you. The defendant claims that it has the right to recover all the expense incurred in getting the material out and putting it back at the site of the bridge. By the terms of this contract the defendant was to furnish this material, and all the plaintiff had to do was to unload the material and place it in position in the bridge. It therefore follows from that that this plaintiff was only a bailee, or simply had the custody of the property, the ownership of the property remaining all the time in the defendant, and that as such bailee the plaintiff was not the insurer of that material, and was not liable for loss that might occur to it without his fault. Now, I direct you, gentlemen, in the light of his contract, that the plaintiff in this was simply bailee of defendant, having the right to use the material to perform certain service upon it, for which he was to be paid the contract
69 price, and that as such bailee he was only required to take ordi-

nary care of it, and if he did exercise such care, and loss or damage happened to the material, such as this flood, this fall into the river, that he is not liable to this defendant therefor. As bailee he was to exercise ordinary care in taking care of the materials, and if he did not exercise such care, and damage and injury resulted by allowing it to fall into the river, either by the force of the flood or in any other way, then he may be liable and required to pay the defendant for the recovery and for the work and labor performed on the iron for the purpose of putting it into the bridge. If the span fell by reason of the flood alone, then the plaintiff is not liable, and is not required in that instance to pull it out of the river. If he is not required to do that, the defendant having done it, has no right to recover for this work. But if the bridge went down by reason of the defective character of the false work, then the plaintiff is entitled to recover for the loss occasioned by the delay and the expense thereupon. But in any other event, if it went down by the flood, and the flood alone, this plaintiff simply being the bailee of the property, was not responsible to the defendant for the
70 work and labor required to recover it, because it was taking care of its own property. Under the law of bailments the bailee is not required to be responsible for anything but his own carelessness; and you will require, on that point, evidence on behalf of the plaintiff to show that this accident was not by his carelessness."

To this part of the charge as given the defendant also at the time excepted as not being correct in matter of law.

And the defendant also excepted to the refusal of the court to charge or to instruct the jury as it had requested.

Thereupon the jury retired and in due time returned their verdict, finding for the plaintiff and assessing his damages at $3,039.89. And thereupon the defendant, in due time, filed his written motion for the court to vacate said verdict, and to grant a new trial upon the several grounds and for the reasons therein set forth.

Afterwards, the court having heard the argument of counsel on said motion, did overrule the said motion, and refuse to vacate or set aside said verdict and to grant a new trial. To which ruling the defendant at the time excepted.

And thereupon the court proceeded to and did render a judg-
71 ment against the defendant and in favor of the plaintiff for the amount of said verdict; to which the defendant also at the time excepted.

And thereupon, the defendant tendered to the court this, its bill of exceptions, and asked that the same be allowed, signed, and sealed, and ordered to be made a part of the record which is accordingly done.

M. WELKER, [SEAL.]
Dist. Judge, N. Dist. of Ohio.

Assignment of errors.

Supreme court of the United States. October term, 1880.

THE KELLOGG BRIDGE COMPANY, PLAINTIFF in error,
vs.
THOMAS H. HAMILTON, DEFENDANT IN ERROR.

And now comes the said The Kellogg Bridge Company, plaintiff in

error, by its attorney, and says that in the record and proceedings of the circuit court of the United States for the western division of the northern district of Ohio, in a certain action therein pending, wherein the said Thomas H. Hamilton, defendant in error, was plaintiff, and the said plaintiff in error was defendant, and in which action a judg-

72 ment was rendered by said court at the December term, A. D. 1879, thereof against said plaintiff in error, and in favor of said defendant in error, for the sum of $3,039.89 debt, and $, costs of suit, an authenticated transcript of which said record and proceedings is annexed to and returned with the writ of error issued in this cause; these are the following errors, to wit:

1st. Said circuit court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that he did, in fact, assume the cost of and pay for said false work; and that a portion of the piling which had been driven by the plaintiff in error prior to the execution of the contract, and which by the terms of said contract he had agreed to assume and pay for, was insufficient for the purpose and improperly done; and that he had no knowledge of such insufficiency or imperfection.

2nd. Said circuit court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that during the progress of the erection of said bridge he was subjected to extra costs and expense in remedying the alleged insufficiency of the piling which had been done by the plaintiff in error, and also was delayed thereby in the completion of said bridge beyond the first of March, 1878.

73 3rd. Said circuit court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that if the piles driven by the plaintiff in error prior to the execution of said contract had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood, and the span would not have fallen into the river, and that in consequence of such falling of the span he was subjected to extra and increased expense and delay in the re-erection of said span with the material originally intended for the third of said fixed spans, and in the erection of said bridge, and in replacing of the false work also carried away.

4th. Said circuit court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that after the first day of March, 1878, and while engaged in the erection of said bridge, a heavy gust of wind blew down a certain appliance called a "traveler" used by him in the work of erecting said bridge, and injured said "traveler."

5th. Said circuit court erred in allowing said last mentioned testimony to be given subject to further consideration by the court and objections by plaintiff in error, and subject to instructions in the charge to the jury.

74 6th. Said circuit court erred in refusing to grant the motion of plaintiff in error for the court to rule out from consideration by the jury all testimony offered by the defendant in error as to the insufficiency of the false work, so called, when he took charge of the work under his contract with the plaintiff in error.

7th. Said circuit court erred in refusing to grant the motion of plaintiff in error for the court to rule out from consideration by the jury all testimony offered by defendant in error as to any cost or expense which he was put to in consequence of the said false work not having been properly constructed or of sufficient strength to support the bridge, or to resist the force of the ice and flood.

8th. Said circuit court erred in refusing to grant the motion of plaintiff in error for the court to rule out from consideration by the jury all testimony offered by the defendant in error as to damage or cost occasioned by the falling of any part of the bridge on account of flood in the river, whether said damage and cost were in rebuilding said fallen part of said bridge, or in the extra expense on account of delay in erecting other parts of the bridge, or of replacing any of said false work which had been carried away.

9th. Said circuit court erred in refusing to grant the motion of
75 plaintiff in error for the court to rule out from consideration by the jury all testimony offered by the defendant in error as to the cost and damage occasioned by the blowing over by the wind or otherwise injuring the "traveler" or any other of the implements used by the defendant in error in erecting the bridge.

10th. Said circuit court erred in refusing, after the evidence in behalf of both parties had been concluded and before any argument to the jury, to instruct the jury in matters of law involved in the action, as requested by the plaintiff in error.

11th. Said circuit court erred in refusing, after the evidence in behalf of both parties had been concluded, and before any argument to the jury, to instruct the jury, as requested by the plaintiff in error, upon any of the several question' of law to be involved in the action.

12th. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff in error, in its request numbered one.

13th. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff in error, in its request numbered two.

14th. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff in error, in its request numbered three.

76 15th. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff in error, in its request numbered four.

16th. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff in error, in its request numbered five.

17th. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff in error.

18th. Said circuit court erred in that portion of its charge to the jury embraced within the first exception thereto by the plaintiff in error, as appears in the bill of exceptions.

19th. Said circuit court erred in that portion of its charge included within the second exception thereto, by the plaintiff in error, as appears in the bill of exceptions.

20th. Said circuit court erred in that portion of its said charge included within the third exception thereto by the plaintiff in error, as appears in the bill of exceptions.

21st. Said circuit court erred in that portion of its said charge included within the last exception thereto by plaintiff in error, as appears in the bill of exceptions.

22nd. Said circuit court erred in its charge to the jury as given.

23rd. Said circuit court erred in overruling the motion of the plaintiff in error for a new trial.

77 24th. Said circuit court erred in rendering a judgment in favor of the defendant in error and against the plaintiff in error.

Wherefore the said plaintiff in error asks that the said judgment of said circuit court be reversed at the costs of the defendant in error, and

the said plaintiff in error be restored to all things he has lost by reason of said judgment.

RICHARD WAITE,
Attorney for Pl'ff in Error.

And afterwards, to wit, on the 17th day of February, 1880, there was filed in said court a bond in words and figures following, to wit:

Know all men by these presents, that we, Rufus L. Howard, Horace Stillman, George Beals, and C. V. N. Kittridge are held and firmly bound unto Thomas H. Hamilton in the just and full sum of six thousand and one hundred dollars, to be paid to the said Thomas H. Hamilton, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals and dated this 9th day of February, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at the December term, A. D. 1879, of the circuit court of the United States for the western division of the northern district of Ohio, in a suit depending in said court wherein the said Thomas H. Hamilton was plaintiff and The Kellogg Bridge Company was defendant, a judgment was rendered against said bridge company and in favor of said Thomas H. Hamilton, and the said bridge company having obtained a writ of error, and lodged a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas H. Hamilton, citing and admonishing him to appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said The Kellogg Bridge Company, shall prosecute its said writ of error to effect, and, if it fail to make its plea good, shall answer all damages and costs, then the above obligation to be void; otherwise to remain in full force and virtue.

RUFUS L. HOWARD. [SEAL.]
HORACE STILLMAN. [SEAL.]
GEORGE BEALS. [SEAL.]
C. V. N. KITTRIDGE. [SEAL.]

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

I hereby certify that I am personally acquainted with the above-named sureties, and consider either of them to be good and ample security for the within-named sum, being worth, in my opinion, not less than fifty thousand dollars each.

Dated February 9th, 1880.

WM. W. HAMMOND,
County Judge of Erie Co.

Approved and filed February 17th, A. D. 1880.

M. WELKER,
District Judge, &c.

The United States of America to Thomas H. Hamilton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's

office of the circuit court of the United States for the western division of the northern district of Ohio, wherein The Kellogg Bridge Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of February, in the year of our Lord one thousand eight hundred and eighty, and in 104th year of the Independence of the United States of America.

M. WELKER, [SEAL.]
District Judge & Acting Circuit Judge.

80½ Service of the within citation acknowledged this 20th day of February, A. D. 1880.

THOMAS H. HAMILTON,
By J. C. LEE, *his Attorney.*

Filed.

81 *Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Thomas H. Hamilton is plaintiff and The Kellogg Bridge Company is defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Toledo, in said division and district, this 6th day of May, A. D. one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth year.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

82 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, as judges aforesaid, between Thomas H. Hamilton, as plaintiff, and The Kellogg Bridge Company, as defendant, a manifest error hath happened, to the great damage of the said The Kellogg Bridge Company, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what

of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 17th day of February, in the year of our Lord one thousand eight hundred and eighty.

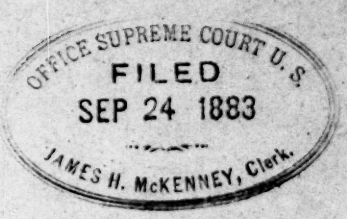
AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States,
Northern District of Ohio, Western Division.

Allowed by—

(Indorsed:) Filed Feb'y 17th, 1880. A. J. Ricks, clerk. Filed Feb'y 17th, 1880. A. J. Ricks, clerk.

(Indorsement on cover:) No. 600. The Kellogg Bridge Company, plaintiff in error, vs. Thomas H. Hamilton. N. Ohio, C. C. U. S. Filed 5th October, 1880.

110-108



Supreme Court of the United States.

No. 59.

THE KELLOGG BRIDGE COMPANY,

Plaintiff in Error,

—*vs.*—

THOMAS H. HAMILTON,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

R. & E. T. WAITE,

Attorneys for Plaintiff in Error.

Supreme Court of the United States.

THE KELLOGG BRIDGE COMPANY,

Plaintiff in Error,

—*vs.*—

THOMAS H. HAMILTON,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case. The record discloses these facts: Prior to December 15th, 1877, the defendant below, The Kellogg Bridge Company, had entered into a contract with the Lake Shore and Michigan Southern Railway Company, under which it undertook to construct for said railway company an iron bridge over the Maumee river, at Toledo, Ohio. This bridge consisted of three independent fixed spans, each 175½ feet long, suspended between and resting at each end of the span upon stone piers which had been prepared to receive the same, and one draw span 185 feet in

length, resting upon a pier in the center, also then prepared. For the purpose of erecting each of these spans, it was necessary to build and use what was termed false work, which consisted of a platform resting on piles driven in the river and between the piers on which the span to be erected rested; and the Bridge Company had commenced to construct such false work, preparatory to the erection itself of such bridge, by driving all the piles for the first and second spans and laying some of the necessary timbers thereon. On the 15th of December, 1877, the Bridge Company entered into a contract with the plaintiff below, which contract was on December 28th, 1877, reduced to writing and signed by the parties, and was as follows, to wit: (Page 13 of printed record.)

"Agreement made this 15th day of December, 1877, between T. H. Hamilton, of Toledo, Ohio, of the first part, and the Kellogg Bridge Company, of Buffalo, N. Y., of the second part, witnesseth:

"That the said party of the first part hereby agrees to furnish and prepare all necessary false work, and erect the iron bridge now being constructed by the said party of the second part for the Lake Shore and Michigan Southern R. R. Co., at Toledo, Ohio, over the Maumee River, receiving said bridge material as it arrives on the cars, at the site of said bridge, and erecting the same in the best manner, according to the design of said bridge and the directions of said second party, from time to time, commencing the erection of said work when required to do so by said second party, and proceeding with the same with a force sufficient to complete the entire work on or before the first day of March next; the said first party also agrees to assume and *and* pay for all work done and materials furnished up to the time of executing this contract, including piling and piles, timber and other materials, and labor done on the same, but not including bolts and washers which have been furnished by the party of the

second part, but to return said bolts and washers to the said second party or pay for the same on completion of the said bridge.

"And the said first party, in consideration of the payments hereinafter mentioned, to be made by said second party, agrees to perform all the stipulations of this agreement in a thorough and workmanlike manner, and to the satisfaction of the second party.

"And if at any time the said second party is not satisfied with the manner of performing the work herein described, or the rapidity with which it is being done, the second party shall have full power and liberty to put on such force as may be necessary to complete the work within the time named, and provide such tools or materials for false work as may be necessary, and charge the cost of the same to the said first party, who agrees to pay therefor.

"The consideration of the faithful performance of all the stipulations as hereinafter mentioned to be performed by the first party, the second party hereby agrees to pay the first party the sum of four thousand and three dollars (4,003.) in manner following: On completion of the first span, nine hundred dollars (900;) on completion of the second span, nine hundred dollars (900;) the third span, eight hundred dollars (800.) and on completion of the draw and the entire work, fourteen hundred and three dollars (1,403.) but payment in each and all cases to be made only on the acceptance of each part of the work by the chief engineer of the L. S. & M. S. R R. Co, on the 15th day of each month after such acceptance.

"Witness our signatures and seals the 28th day of December, 1877.

T. H. HAMILTON. [SEAL]

[SEAL OF K. B. CO.]

CHAS. KELLOGG,

"Attest:

Pres't Kellogg Bridge Co.

"C. V. N. KITTRIDGE, *Sec'y.*"

The bridge was erected under this contract. And afterwards Hamilton commenced a suit against the Bridge Company in the Court of Common Pleas for

Lucas County, Ohio, to recover (less payments admitted to have been made) the contract price, and also damages claimed to have been sustained by him in consequence of the insufficient and defective construction of this false work put in by the Bridge Company prior to the contract with him. (See petition page 1 of printed record.) This cause was removed to the United States Circuit Court for the Northern District of Ohio, western division, where an issue was made and trial had.

From the bill of exceptions it appears, in addition to the above statement, and among others, that the plaintiff below, at the trial, offered to give in evidence certain testimony to prove that he did in fact assume the cost of and pay for said false work; and that a portion of the piling which had been so driven by the defendant prior to the execution of said contract, and which, by the terms of said contract, plaintiff had agreed to assume and pay for, was insufficient for the purpose and improperly done, and that plaintiff had no knowledge of such insufficiency or imperfection.

The defendant below objected to the introduction of such testimony, but the Court overruled such objection, to which ruling the defendant, at the time, excepted.

Thereupon the plaintiff proceeded to and did give in evidence to the jury testimony tending to prove that certain of the piles so driven by the defendant for the two spans first to be erected were not driven sufficiently deep to sustain in certain parts the weight of the material for said span, after such material had been put in

position and before the several parts thereof had been so coupled together as to enable the span to sustain itself on the piers, independent of said false work; and that the fact of such piling being insufficient was not known to plaintiff at the time he made said contract, and was not apparent upon any examination he then made or could make of said work, and was not discovered or discoverable until, during the progress of the erection of said bridge, the same should be tested.

But plaintiff did not claim, and offered no testimony, that the defendant had at any time made any statement or representation as to the nature or character of the work which had been done by it on said false work. The plaintiff also gave evidence tending to prove that a part of the false work or scaffolding sunk under the weight of the first span, and that he suffered damages by reason thereof, as set forth in his cause of action.

And plaintiff further offered to prove that during the progress of the erection of said bridge he was subjected to extra costs and expense in remedying the alleged insufficiency of the piling which had been done by the defendant, and also was delayed thereby in the completion of said bridge beyond the 1st of March, 1878.

To the introduction of said testimony the defendant objected, but the Court overruled such objection, to which ruling the defendant at the time excepted. Thereupon the plaintiff proceeded to and did give in evidence to the jury testimony to prove as was offered.

And the plaintiff further to maintain the issue on his part gave in evidence to the jury testimony tending to

prove that after the second fixed span to be erected was about two thirds completed, and on the 22nd day of February, A. D. 1878, the ice which had before that time formed by the river, broke up in consequence of and was carried out by a flood which then occurred, and carried away the false work under this span and caused the whole of the iron material then in place in the span, or on the span in place and ready to be put in place, to fall into and sink to the bottom of the river, which was at this place about sixteen feet deep, and also evidence tending to show all the circumstances of the falling of said span, and thereupon proposed to offer further testimony to prove that if the piles driven by the defendant prior to the execution of said contract had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood, and the span would not have fallen into the river, and that in consequence of such falling of the span he was subjected to extra and increased expense and delay in the re erection of said span, and in the replacing of the false work also carried away.

To the introduction of which testimony the defendant objected, but the Court overruled said objection, to which ruling the defendant at the time excepted. And thereupon the plaintiff proceeded to and did introduce further testimony tending to prove as was proposed.

Upon the conclusion of the testimony in chief in behalf of the plaintiff, and before it had offered any testimony in its behalf, the defendant moved the Court to rule out severally from consideration by the jury all

testimony offered by the plaintiff on each of the foregoing points.

But the Court refused to grant such motion, and to rule out any part of said testimony, to which ruling the defendant also at the time excepted.

After the evidence in behalf of both parties had been concluded, counsel for the defendant requested the Court to charge the jury among other matters as follows:

1st. The defendant in this action is not liable to any damages, cost or expense occasioned by the insufficiency of the false work, whether that insufficiency was the improper construction or want of strength of its materials.

But the Court refused to so charge and proceeded to and did charge the jury, after first reciting to them the issues involved in the case as presented by the pleadings, among other matters, as follows, to-wit:

"Another question that grows out of this contract is in relation to this scaffolding, this false work. One of the grounds of delay and additional expense that is complained of in the suit is that the false work, or what is called the scaffolding, by reason of its defective character, caused a great delay, for which the plaintiff claims he is entitled to recover damages in this action, as by the terms of the contract the false work, which had been done by the defendant, was taken by the plaintiff. It is shown that the defendant itself, undertook, by its employes, to erect this bridge, and that they had gone on and driven piles for the false work necessary to erect the first and second spans at the time the plantiff undertook, in place of the bridge company, to erect this bridge. It is claimed on behalf of the plaintiff that when this contract was made, and when the plaintiff took the work already constructed, that the law raises in his favor an implied warranty that the work already done by the bridge company was done in

a workmanlike manner, and suited to the purposes for which it was put in, and to be used by the plaintiff.

"The defendant claims that while the plaintiff took the work, it took it just as it was, and that the defendant is not responsible to him for any defect there was in it. Now, in the construction of contracts we look into the circumstances surrounding the parties at the time of the execution of the contract, and give such a fair and reasonable construction to it as will carry out the intent and purposes of the parties who make the contract. Applying these rules to this contract, I give it to you as a good construction of it, that if the false work already constructed was sold by the defendant to plaintiff this implied warranty necessarily follows this sale; also, that a fair interpretation of its terms would be that the plaintiff was to take all the false work, pay for it, assume the contract made by the bridge company with reference to it, and furnish all the additional false work that might be necessary. Taking these two together, I direct that by the terms of this contract there was an implied warranty on behalf of the defendant that this false work was suitable and proper for the purposes for which it was to be used by the parties. And so, gentlemen, if the evidence shows you that the particular work which was said to be defective was such that the plaintiff could not by examination ascertain its defects (for if they were apparent by mere examination of the false work, it was the duty of the plaintiff to make that good) he has a right to rely upon the implied warranty; that is if the defects were such that they could not be, by ordinary observation and care on behalf of the plaintiff ascertained and found out.

"Then it is alleged that by reason of the defective character of this false work, this plaintiff was delayed in the work necessary for him to perform in putting this bridge together. If you find, gentlemen, from the evidence, that the plaintiff was delayed by the unreasonable and unworkmanlike manner in which the work was done, or incurred additional expense in making that false work suitable, then the plaintiff has the right to recover for the unreasonable delay occasioned by the defective character of that work."

To all the foregoing part of the charge, the defendant in due form excepted, as not being correct in matter of law.

And the court further charged the jury, upon the question of the damages claimed by the plaintiff to grow out of the flood that took place during the progress of the work, in part as follows: (Bottom of page 25 of record.)

"If the fall of the bridge was occasioned by the improper construction of the false work exclusively, then the injury did not result from the freshet that carried it off; and if that happened by reason of the defective character of the false work the damages would not be remote, and the plaintiff would be entitled to recover. This is what is substantially claimed by counsel on the part of defendant, but I have put it in different language.

"If you find that the fall of the bridge was occasioned by the defective character of the false work, and the damages resulting to the plaintiff occasioned by the flood on the 22nd day of February was by reason of this defective work, then the plaintiff is entitled to recover. It will be important for you in applying these general principles in this case to ascertain from the proof what was the cause of that span falling down. That will necessarily require an examination into the character of this false work and the driving of these piles. Ascertain whether in doing that the defendant exercised proper care and workmanship. In that matter, in order to be absolutely insured of the safety of that scaffolding or false work, they must exercise care and diligence in the workmanship and construction of it."

And to this part of the charge, as given, the defendant also excepted; being that portion of the charge included within the third exception thereto, and covered by the twentieth assignment of errors.

The defendant also excepted to the refusal of the Court to charge the jury as it had requested. The

verdict was for the plaintiff. A motion for a new trial was made in behalf of the defendant, and overruled, and a judgment was rendered accordingly. To all of which the defendant severally excepted.

II.

Assignment of Errors. The following errors have been assigned, and are now intended to be urged, viz: (Pages 28 and 29 of printed record.)

First. Said Circuit Court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that he did, in fact, assume the cost of and pay for said false work; and that a portion of the piling which had been driven by the plaintiff in error prior to the execution of the contract, and which by the terms of said contract he had agreed to assume and pay for, was insufficient for the purpose and improperly done; and that he had no knowledge of such insufficiency or imperfection.

Second. Said Circuit Court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that during the progress of the erection of said bridge he was subjected to extra costs and expense in remedying the alleged insufficiency of the piling which had been done by the plaintiff in error, and also was delayed thereby in the completion of said bridge beyond the first of March, 1878.

Third. Said Circuit Court erred in permitting the defendant in error to give in evidence to the jury testimony to prove that if the piles driven by the plaintiff in error prior to the execution of said contract had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood, and the span would not have fallen into the river; and that in consequence of such falling of the span, he was subjected to extra and increased expense and delay in the re-erection of said span with the material originally intended for the third of said fixed spans, and in the erection of said bridge, and in replacing of the false work also carried away.

Sixth. Said Circuit Court erred in refusing to grant the motion of plaintiff in error for the court to rule out from consideration by the jury all testimony offered by the defendant in error as to the insufficiency of the false work (so called) when he took charge of the work under his contract with the plaintiff in error.

Seventh. Said Circuit Court erred in refusing to grant the motion of plaintiff in error for the court to rule out from consideration by the jury all testimony offered by defendant in error as to any cost or expense which he was put to in consequence of the said false work not having been properly constructed or of sufficient strength to support the bridge, or to resist the force of the ice and flood.

Twelfth. Said Circuit Court erred in refusing to charge the jury as requested by the plaintiff in error in its request numbered one.

Eighteenth. Said Circuit Court erred in that portion of its charge to the jury embraced within the first exception thereto by the plaintiff in error, as appears in the bill of exceptions.

Twentieth. Said Circuit Court erred in that portion of its said charge included within the third exception thereto by the plaintiff in error, as appears in the bill of exceptions.

Twenty-third. Said Circuit Court erred in overruling the motion of the plaintiff in error for a new trial.

Twenty-fourth. Said Circuit Court erred in rendering a judgment in favor of the defendant in error and against the plaintiff in error.

III.

ARGUMENT.

Question Presented.—The questions presented by these several alleged errors may very properly be considered together, for they all depend upon the one question of whether the court below erred in its charge, substantially, that by the terms of the contract be-

tween the parties and upon which the action was founded there was an implied warranty on behalf of the Bridge Company that the false work, so far as it had been completed, was suitable and proper for the purposes for which it was to be used by Hamilton. And we submit that the Circuit Court erred in refusing to give the first request to charge asked by the defendant below, and in the charge actually given on the subject of said request, which request and charge are set out fully in the foregoing statement of the case.

The Written Contract must Control.—This contract was reduced to writing, and consequently the evidence of any warranty concerning the false work must be looked for in the instrument, explained, if need be, by the surrounding circumstances. As Savage, C. J., aptly says in *VanOstrand v. Reed*, 1 Wend. (432): "Suppose one man sells to another a horse; he represents him sound, and gentle, and useful; but a bill of sale is given in writing, which contains a bare transfer of the animal, without any warranty or engagement as to the soundness or good qualities of the horse; could the purchaser in that case go back and prove the representations and assertions made before the execution of the bill of sale? I think not. Where a contract has been consummated by writing, the presumption is, that the writing contains the whole contract."

All there is in this contract (which is given above in full.) on the subject of the false work is thus express-

ed: "The said party of the first part (plaintiff below) hereby agrees to furnish and prepare all necessary false work and to erect the iron bridge," etc., "and also agrees to assume and pay for all work done and materials furnished up to the time of executing this contract, including piling and piles, timber and other materials and labor done on the same, but not including bolts and washers," etc.

There was no allegation in the petition (page 1 of record) of any representation whatever as to the character, suitableness or sufficiency of this false work so far as it had been put in by the Bridge Company; and the bill of exceptions expressly shows that, upon the trial, "the plaintiff did not claim and offered no testimony that the defendant had at any time made any statement or representation as to the nature or character of the work which had been done by it on said false work" (Page 20 of Record.) No *express* warranty was claimed; and no fraud of any character was imputed to the Bridge Company.

So that it was clearly a case of warranty that depended upon the construction to be given to the written contract between the parties; and the sole question was whether this contract thus made showed that, when the plaintiff below took the work which had already been done by the defendant below and agreed to pay for it what it had cost, there was an *implied* warranty on the part of the defendant that it was sufficient for the use to which plaintiff would put it, in the erection by him of the bridge.

In the construction of contracts, the main rule is to

make them speak the true intention of the parties. There certainly is nothing in this contract itself which indicates any intention or purpose on the part of the Bridge Company to warrant the quality of the work done or materials furnished by it for this false work; and we respectfully submit, without further comment, that, even after it is viewed in the light of the subject matter, the situation of the parties, and the surrounding circumstances, there is nothing from which such a warranty can be inferred under any of the established rules for the construction of contracts; but on the contrary, that it clearly indicates a simple transfer of the ownership which the Company had in the work and materials as they then existed, Hamilton merely stepping into the place of the Company in respect to them, and assuming to complete for his own purpose what had been commenced for its purpose.

The Rule of *Caveat Emptor* Applies. — There is nothing in the case, either of surrounding circumstances or in the evidence, to show that this portion of the false work, thus prepared by the Bridge Company, must necessarily be used in a prescribed manner. It, for aught that appears, might have been ample when used as the Company would have completed and used it, but insufficient when used as Hamilton did complete and use it. He knew just how far the Company had progressed in its preparation and that it was incomplete. He undertook, with what he found there, and with what he should find necessary for any purpose to add by way of work and material, himself to furnish and prepare the necessary false work. If what he

found was not enough or not sufficient, it was for him to make it so.

The pleadings and the testimony in the case show that Hamilton was an experienced bridge builder; and that the Bridge Company had, under a contract with the Railroad Company for the building and erection of the whole bridge, commenced the work of putting in for their own use the necessary platforms (or false work) in order to carry out their contract, expecting to use it for themselves, and in no manner for sale to any other person. Having progressed so far in the performance of their contract, the Bridge Company sub let to Hamilton the putting up of the iron work of the bridge and made with him the contract referred to, by which he, as we claim, was to take from the Bridge Company, at cost, whatever preparation it had already made towards the performance of the whole work.

We submit that, under the circumstances, Hamilton took the false work for *what it was, just as it stood*, and that the rule of *caveat emptor* applies with its full force.

"The principle of the rule of *caveat emptor*, is this, that the vendee has it in his power to guard against any *latent* defects or deception in the article purchased, by exacting a warranty from the vendor; but if, instead of taking this precaution, he will trust to his own sagacity and judgment, he should bear the loss if they deceived him. The principle assumes that both parties are equally innocent, and it throws the loss upon him who omits to exact that which would have afforded him ample protection, the exacting of which would have apprised the opposite party of the necessity of taking measures for his own indemnity."—*Welsh v. Carter*, 1 Wend. (190).

The case of *Parkinson v. Lee*, 2 East, 314, has become a leading authority upon the subject of implied warranty in the ordinary sale of merchandise. This was a sale of five pockets of hops, samples of which were taken from each pocket and exhibited at the time of the sale. Latent defects were afterwards discovered. The court say:

"The question is, whether in the case of a sale made under the present circumstances, there be any implied undertaking in law, that the commodity be merchantable? No express undertaking is proved to that effect; and there is no fraud imputed to the defendant. The mode of dealing is that the plaintiff buys hops of the defendant whom he knows is not the grower, by samples taken from the pockets in which the commodity is close packed. He has opportunity of judging by the samples, such as he finds them at the time. If he doubts the goodness, or does not choose to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But if there be no such warranty, and the seller sells the thing, such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. *It is the fault of the buyer that he did not insist on a warranty;* and if we were to say that there was, notwithstanding, an implied warranty arising from the conditions of the sale, we should again be opening the controversy, which existed before, in the case in *Douglass*" And again: "There were no representations made by the defendant to the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered to sale, which might or might not have a latent defect; this was well known in the trade; and the plaintiff might, if he pleased, have provided against the risk, by requiring a special warranty. Instead of which a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing as he must have known, as a dealer in the commodity, that it

was subject to the latent defects which afterwards appeared, he bought it at his own risk. *I know of no authority which makes the seller liable for a latent defect where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing.*"

Exception in Case of Manufacturers does not Apply.—Upon sales of chattel property the general rule is that no implied warranty of quality attaches. In the absence of representations or concealment amounting to fraud, or of an express contract covering defects, the buyer assumes the risk of the article failing to meet his expectations, or to fill any specific purpose.

Addison on Contracts, Vol. 2, Sec. 616.
Benjamin on Sales, Sec. 644.
Parsons on Contracts, Vol. 1, p. 460.*
Mixer v. Coburn, 11 Met. 559.

The only exception to this general rule which can be claimed to apply to the facts of this case is that held to govern purchases from manufacturers. This exception has grown out of the supposed superior knowledge and skill of the vendor, and the exception is limited to purchases from manufacturers, and, possibly, from persons occupying the position of manufacturers, and of articles ordered for a specific purpose.

Some cases seem to recognize the exceptions as covering sales made by dealers in certain specific articles, as well as manufacturers, but we think the better statement limits the exception to manufacturers alone.

Bartlett v. Hoppock, 34 N. Y. 118.
Dounce v. Dow, 64 N. Y. 411.
Hoe v. Sanborn, 21 N. Y. 552.
Rodgers & Co. v. Niles & Co., 11 Ohio St. 48.

But, whether the exception applies to a dealer or manufacturer, the position of the purchaser to the seller must have been such that the buyer is presumed to have relied upon the skill or knowledge of the seller.

It is not sufficient that a special thing is ordered of the dealer or manufacturer, but it must have been ordered and sold for, or to serve, a specific purpose.

Parsons on Cont., Vol. 1, p. 470 *
Benjamin on Sales, Sec. 661.
Dounce v. Dow, 64 N. Y. 411.
Port Carbon Iron Co. v. Groves, 68 Penn. St 149.
Walker v. Pue, 57 Md. 155.

In some instances the courts have held there was an implied warranty where the vendee desired an article for a specific purpose, and the vendor furnished the article *knowing that the vendee relied upon his complying with such desire.*

"Where an agreement is for a specific chattel in its *then state*, there is no implied warranty of its fitness or merchantable quality; but if a person is employed to *make* a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used."

Broom's Legal Maxims, 614, and approved in *Rodgers & Co., v. Niles & Co.*, 11 O. S., 48.

Another authority says, "It is obvious, that notwithstanding the goods are sold for a particular use, if the purchaser himself understands what he wants and selects such goods as he deems adapted to the intended use, there is no warranty.

Hoe v. Sanborn, 21 N. Y. 552.

"In such a purchase without warranty, a man's eyes, taste and senses, must be his protection."

An examination of the facts in the present case to which the above principles can be applied, will show that this is not the case of an article manufactured to order for a known special or specific purpose, as in *Rodgers & Co. v. Niles & Co.*, *Supra*, and *Park v. Morris Axe and Tool Co.*, 4 Lansing, (N. Y.) 103, or of an article manufactured for a particular use and offered generally for sale; but it is rather that of a party, not properly a manufacturer of such articles, who has partially constructed an appliance intended to be used by himself in the prosecution of certain work, and then sold it to another party, who has undertaken this work, to be used when completed by him in the prosecution of this work. And we therefore claim that the exception to the general rule will not apply in the present case, because:

First.—The parties to the contract did not occupy such position to each other that the purchaser is presumed to trust to the superior knowledge or skill of the vendor.

Second.—The vendor was in no sense a manufac-

turer of any specific article ordered by the purchaser.

Third.—Nothing is disclosed showing that the seller intended to warrant the sufficiency of the structure, or that the parties contemplated anything in the sale beyond the transfer of the labor and material already in the same.

The principle we are contending for is so well stated in *Chanter v. Hopkins*, 4 M. & W. 399, that we make the following quotation from the opinion of Parke, B.:

"The rule of law is clear that you cannot add to or diminish a written contract by anything in parol which may have occurred between the parties. If indeed there has been any fraudulent representation, the buyer may relieve himself from the contract on the ground of fraud; but here the defendant does not pretend to impute fraud to the plaintiff. He cannot then be allowed to give parol evidence as to any warranty not contained in the agreement itself; and the question is therefore reduced to the construction of the words in the agreement, as contained in the order. Now, I agree with the authority which Mr. *Byles* has referred to, of *Jones v. Bright*, (5 Bingh. 583), that if an order is given for an *undescribed and unascertained* thing, stated to be for a particular purpose which the manufacturer supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied. The case may be illustrated by the example which has been already referred to. Suppose a party offered to sell me a horse of such a description as would suit my carriage; he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse; and it appears to me that the present is a similar case. The order is: "send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace." The purchase is of a defined and

well known machine. The plaintiff has performed his part of the contract by sending that machine; and it is the defendant's concern whether it answers the purpose for which he wanted it or not. As I read the contract, all the plaintiff has to do, is to send his patent machine, and whether it answers the purpose of the defendant or not, with that the plaintiff has nothing to do; he has furnished the machine contracted for, and he is entitled on that contract to recover the stipulated price."

In this connection the language of the contract should again be noticed. Hamilton "agrees to *furnish and prepare* all necessary false work, and erect the iron bridge," and the only reference to the existing false work is where he "agrees to assume and pay for all work done and materials furnished up to the time of executing the contract, including piling," etc. In other words, Hamilton contracted to erect the bridge; for that purpose false work was required; he agreed to furnish and provide this at his own expense; and to this end he also agreed to take off the hands of the Bridge Company such false work as they had already provided for their own use, not because of any reliance he placed upon their skill or ability in its construction, but because it was a part of the whole contract that he should assume and relieve them of this expense.

On the part of the Bridge Company it was a simple sale of what they had. There is nothing in the contract or transaction to indicate the manufacture by the seller for the purchaser of a specific article for a specific use, such as, under any of the reported cases on this subject, an implied warranty of quality can attach.

A distinction should be made between the regular manufacturer of articles for use of the purchaser, and the maker of an article for his own use.

Exception in Case of Concealment does not Apply.—The other exception to the general rule of *caveat emptor*, that of concealment, deceit or fraud does not apply here. All of the cases sustaining an implied warranty where there has been a concealment by the vendor of material facts, proceed upon the principle of an obligation resting upon the vendor to disclose to his purchaser all matters affecting the value of the article sold which are known to him and not accessible to the other, a concealment of which would amount to a fraud upon the purchaser; and they hold that the question of whether there was such a concealment amounting to fraud was for the jury to determine and not for the court; and all assume and take it for granted that without such concealment the rule of *caveat emptor* applies. As there was nothing in this case charging any concealment on the part of the Bridge Company, and no warranty was claimed because of such concealment, there was no issue of this question to be determined.

Under this head we refer the court to

Parsons on Cont., Vol. 1, p. 461.*
ditto Vol. 2, p. 273.*
Laidlaw v. Organ, 2 Wheat., 178.
Kintzing v. McElrath, 2 Barr's Rep. 467.
Hadley v. The Clinton County Importing Co., 13 Ohio St. 502.

There was nothing in the testimony to show that the Bridge Company knew, or even had reason to suspect, that the piles were not driven sufficiently deep to sustain the weight of the span while being erected in position; but on the contrary it is fair to presume that they intended and supposed they were sufficient for all the purposes expected of them. If such was the case there was no fact known to them, and nothing they were bound to disclose was concealed. Hence there was nothing under this principle of law which would justify or sustain the law on this subject as given by the court to the jury, and to which exceptions were taken.

Other Parts of Charge Unwarranted.— One further point we wish to submit under the *issues* in this case:

The only claim made in the petition on account of the insufficiency of the false work is found in the fourth cause of action. (Record page 6, clauses 16 and 17.) Saying nothing of the bare statement therein that "the plaintiff so agreed, *upon the belief and understanding* that said false work had been prepared of good and sufficient material, and in a good and workmanlike manner, and of sufficient strength and durability to answer the purpose for which the same was designed," the only claim for damages on account of the deficiency of the false work is for the loss and expense the plaintiff was subjected to in (we may guess) making it sufficient, which is stated at one hundred and fifty dollars; and no where else is any damage whatever claimed on that account.

Yet the learned judge below further charged the jury that "if they find that the plaintiff was delayed by the unreasonable and unworkmanlike manner in which the work was done * * * then the plaintiff has the right to recover for the unreasonable delay occasioned by the defective character of that work." (Page 24 of record, bottom)

And again, "if the fall of the bridge was occasioned by the improper construction of the false work exclusively, then the injury did not result from the freshet that carried it off; and if that happened by reason of the defective character of the false work, the damages would not be remote and the plaintiff would be entitled to recover." (Page 24 of record at bottom, and covered by 20th assignment of errors.)

Both of which charges we think were uncalled for, unwarranted and erroneous; and tended, to say the least, to mislead the jury by giving them to suppose that more than one hundred and fifty dollars could be allowed for any insufficiency in the false work.

Conclusion.—The deductions which we claim from the application of the above principles to the facts in the case, are:

1. There is nothing in the written contract, and the only one on which this action was founded, which would justify the construction thereof by the court, when it said to the jury, after stating the general rules for the construction of such contracts, "I give it to you as a good construction of it, (this contract,) that

if the false work already constructed was sold by the defendant to plaintiff this implied warranty," (*i. e.* as stated before, "that the work already done by the Bridge Company, was done in a workmanlike manner, and suited to the purpose for which it was put in, and to be used by the plaintiff,") "*necessarily follows this sale*;" and when it further said: "I direct that *by the terms of this contract there was an implied warranty on behalf of the defendant* that this false work was suitable and proper for the purposes for which it was to be used by the parties."

2. There are no such elements entering into this contract which would justify the inference of an implied warranty as to the quality of the article sold, or would bring the parties within any other rule, applicable to this feature of the contract, than that of *caveat emptor*.

3. No exception to the general rule of *caveat emptor* is applicable to the peculiar facts and circumstances belonging to the case.

And we therefore claim that the court below erred:

1. In admitting any testimony with reference to the character and sufficiency of the portion of the false work transferred to the plaintiff.

2. In refusing to exclude, at the close of the testimony, from consideration of the jury, the evidence which had been admitted on this subject.

3. In refusing to instruct the jury, as requested in behalf of the defendant, that the defendant was not

liable for any damages occasioned to the plaintiff, by reason of the insufficiency of the false work which had been sold to him, either in its construction or materials.

4. In instructing the jury that there was an implied warranty, on the part of the defendant, of the sufficiency and suitableness of this part of the false work, and

5. In instructing the jury that the defendant was liable for such damages.

R. & E. T. WAITE,
Atty's for Pl'ff in Error.

Rich'd Waite
R. & E. T. Waite

110-108

110-108
OFFICE SUPREME COURT U. S.
FILED
OCT 31 1893
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

NO. 59.

THE KELLOGG BRIDGE COMPANY,
Plaintiff in Error,

—*VS.*—

THOMAS H. HAMILTON,
Defendant in Error.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

R. & E. T. WAITE,
Attorneys for Plaintiff in Error.

110-108

110-108

Supreme Court of the United States.

NO. 59

THE KELLOGG BRIDGE COMPANY,
Plaintiff in Error,

—*VS.*—

THOMAS H. HAMILTON,
Defendant in Error.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

R. & E. T. WAITE,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

THE KELLOGG BRIDGE COMPANY,
Plaintiff in Error,

—*VS.*—

THOMAS H. HAMILTON,
Defendant in Error.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

1. In response to that part of the brief in behalf of the defendant in error, which refers to the jurisdiction of this court over this cause, we have simply to say that having once submitted that question to the court upon a motion to dismiss for want of jurisdiction, he has now no right to submit it again in this irregular manner. After a question, properly arising in a case, has been submitted to the court, and decided upon its merits, it is paying a doubtful complimen tto the sincerity or ability of the court to again urge it in the same case without leave of

the court upon a proper application for that purpose. If this kind of practice is to be permitted or recognized, there can be no end to any question in a given case.

In *Pollock v. Cohen*, 32 Ohio St. 514, the Supreme Court of Ohio say:

"It is well settled by authority, and is a doctrine sound in principle, that all questions which existed on the record, and could have been considered on the first petition in error, must ever afterwards be treated as settled by the first adjudication of the reviewing court.

"The time should come in the history of a cause when litigation must end. If the failing party was allowed to prosecute a new petition in error, on the same record, whenever he imagined he had discovered a new ground of error not previously assigned, litigation would be interminable. Such a practice would violate well settled principles of law and be against public policy.—*Evans v. St. John*, 9 Porter, 186; *Zimmerman v. Turner, et al.*, 24 Wis., 483; *Lallard v. Lallard*, 5 B. Mon., 340; *Hoadly, et al., v. Challiss*, 15 Kans., 602; *Erving v. McNairy, et al.*, 20 Ohio St., 315; *Peirce v. Kneeland, et al.*, 9 Wis., 23."

If this is the rule as to questions which might have been submitted, how much more applicable is it to questions already decided in the case.

If counsel desire to re-argue this question, let him first apply to the court and obtain permission so to do.

The only question now to be considered in the present stage of this case, is whether the court below erred in the manner and form alleged.

2. But even if the court was disposed to reconsider this question of jurisdiction, the argument now

presented by counsel for defendant in error would avail him nothing, since it is based upon erroneous premises.

It is claimed, and attempted to be figured out, that the counter claim of the defendant below amounted to only $4,899 30, instead of $6,619 70, as averred in its answer. This is done by assuming that Hamilton is in fact entitled to an additional credit from the Bridge Company of $1,720.40. No such assumption is warranted by the record. In his claim, Hamilton admitted he has received from the company on account of the contract, in divers ways, $5,729 40. The Bridge Company in its counter claim, asserted that, under the clause in the contract which provides that "if at any time it was not satisfied with the manner of performing the work therein described, or the rapidity with which it was being done, the company should have full power and liberty to put on such force as might be necessary to complete the work within the time named, and provide such tools or materials for false work as might be necessary, and charge the cost of the same to Hamilton, who agreed to pay for the same," it had paid out not only the $5,729.40 admitted by Hamilton, but other sums aggregating in all $10,628 70; and it was this amount, less the contract price of $4,003, and the other item of $6 00 it was seeking to recover back. Hamilton did not give the company credit for any other sum than the $5,729 40, and the items composing this credit are the same as are charged him by the Company, for the corresponding amount, in its account. Having charged him with all payments made under the pro-

visions of the contract, it must credit him with the contract price to determine the balance the company was entitled to recover back. To then deduct the $1,720 40 from this balance, would be duplicating just so much of the credit admitted by Hamilton.

If, then, under the issues as made by the pleadings, the amount which the Bridge Company would be entitled to recover, if it established its counterclaims, is not below the requisite $5 000, the force of the argument now urged for defendant in error fails

In our former brief upon this subject, we endeavored to show that under the decisions the jurisdiction of this court does not necessarily depend upon the amount of the judgment sought to be reversed. The Bridge Company is not now seeking to be relieved only of a judgment for $3,0;9 89, but to be restored to its right, upon proper proof made, to recover instead a judgment against the defendant in error of over $5,000 This court will not now determine from the record whether the Bridge Company, but for the errors complained of, could have recovered its claim or not. It is sufficient for it to know that in the trial the amount involved, *so far as the Bridge Company was concerned*, was over the statutory amount, and that if the alleged error had not been committed, it might under the issues made by the pleadings, upon sufficient testimony, have obtained a judgment for the full amount claimed by it

3. Upon the question of the implied warranty, we deem it necessary to reply to only a few of the points made by counsel for defendant in error.

It is unneccessary for us to consider the correctness or otherwise of the able and interesting, as well as lengthy, dissertation on the general doctrine of implied warranties as applied to sales by manufacturers of, or dealers in, articles designed and made expressly for the use only of the purchaser. It has no application to the sale of an article made by one exclusively for his own use, and afterwards sold to another having full knowledge of that fact. So far as this doctrine is to be applied to the Bridge Company, the case at bar is that of the ordinary sale of a chattel to be used by the purchaser for the purpose for which it was generally adapted. In our first brief on this subject we urged this distinction, and we flatter ourselves it was done with sufficient clearness not to require any additional remarks here to enable the court to comprehend it; but the learned counsel for defendant in error has entirely overlooked that feature of the case, and has proceeded in his argument upon the assumption that the Bridge Company had regularly manufactured this false-work for the express purpose of selling it to Hamilton, or some one else, to be used in the erection of this bridge, knowing that the purchaser relied upon its skill. Every decision he has cited on this point is a case of the regular manufacture of articles intended for the use of others than the maker. In no other instance can this exception to the general rule of *caveat emptor* be found to have been applied. And we repeat our assertion, that all the facts and circumstances connected with this contract and the transfer of the false-work to Hamilton, keep it within the limits of

the rule of *caveat emptor*, and without the effect of its exemptions.

A person who makes a single article is not thereby a manufacturer of such article in the sense in which that word is used in the decisions establishing this exception to the general rule. Hamilton did not go to the Bridge Company, as a manufacturer of or dealer in false-work, and order made for his use a system of false-work suitable for the erection of the first and second spans of this bridge, or seek to buy the same; nor did the Bridge Company construct this false work as a manufacturer of such articles, or sell it as a dealer therein as was the case, in one form or the other, in *Best v. Jones*, *Gray v. Cox*, *Jones v. Just*, *Gardner v Gray*, *Brown v. Edgington*, *Shepard v. Pybus*, *Byers v. Chapin*, and *Cunningham v. Hall*, cited, and quoted from, by defendant in error.

In *Shepard v. Pybus*, 3 Manning and G., 867, which was the latest of the English decisions, and in which each of the others were considered, there was a clear distinction made between the warranty that the article sold was *reasonably fit for use*, which might be inferred from the transaction, and the implied warranty that it was fit for the *particular* use for which it was intended. This principle as applied to the present case would be, that if the transaction would justify any implied warranty it would be that the false-work was reasonably fit for the purpose of erecting the spans thereon, and not that it was sufficient to resist the uncertain emergency of a flood with ice.

The case of *Jones v. Just*, 3 Q B. L. R. 196, was the case of a sale of a quantity of hemp "to arrive," and the court said "we are of opinion that there is a great distinction between the present case and the sale of goods in esse, which the buyer may inspect, and in which a latent defect may exist, although not discoverable on inspection."

4. The principle, endeavored to be established from *Hoe vs. Sanborn*, that if the vendor has actual knowledge, or can be presumed to know, of latent defects rendering the articles unfit for the use intended, and fails to disclose it, he may be held liable to his vendee for the damages resulting therefrom, we still insist has no application here, for the reason that there is no proof, but the contrary is virtually conceded, that the Bridge Company had either actual or presumed knowledge of the insufficiency of this false-work to sustain the weight of material or to resist the force of the ice and floods. A person who has made an article for his own use should not be held to the same presumable knowledge of latent defects as one who is, because of his known or supposed skill as a manufacturer, employed by another to make the same article.

The real purpose and design of this false work was to sustain the material for the span while being placed in position so that the span could, when completed, sustain itself with the ends resting on the piers. This matter of the flood does not seem to have entered into the minds of either party at the time, or to have formed any part of the consideration for the contract. Nothing will be infused into

a contract which may not be reasonably supposed to have been in the minds of the parties at the time. For aught that appears it was the intention and expectation of the Bridge Company, when it constructed it, and of Hamilton, when he took it, to have the spans erected, and the necessity for the false-work over, before any damaging flood could be reasonably anticipated. And if Hamilton had fulfilled his contract as agreed, this part of the false-work would have served its purpose before this 22d of February, and he would then have been at work on other portions of the bridge with false-work, the piles of which would have been driven by him for use at a time when such floods could more reasonably have been looked for. How then was the court below justified in assuming that the Bridge Company had actual or presumable knowledge of the existence of such latent defects as would render its false work unsuitable? It might have been abundantly strong when completed and used as it would have completed and used it, and it was sufficient for all the ordinary contingencies of flood and ice. When these facts are considered with the well established principles of implied warranty, the error of the court below is manifest.

And here it will be observed that the defects complained of in the false-work was its inability to sustain the material of the span while being erected in place, and to resist the force of the ice and floods on February 22. For all this, the only damages claimed by Hamilton was $150. In its answer, the Bridge Company, in setting up its counter claim,

says, "that not being satisfied with the manner in which the plaintiff was performing his said work, or the rapidity with which it was being done by him, it, with the knowledge, acquiescence, and approval of the plaintiff, put on an extra force of men, and provided such tools and materials as were necessary to complete the same," (as it had the right to do under the contract,) "and charged the cost and expense of such labor and materials to the plaintiff, the items of which appear in the account annexed to said answer," and this account consisted, besides the items which corresponded with the credits given by Hamilton to the Company, of the expense of raising and repairing the fallen span, and rebuilding the destroyed false work; but Hamilton disputed the right of the company to charge him with this expense because it was rendered necessary by the defective condition of the false work which the company had impliedly warranted to be sufficient. This claim of implied warranty is therefore made not so much for the purpose of aiding Hamilton to sustain his action as to enable him to resist the counter claim of the company.

All of which is respectfully submitted.

R. & E. T. WAITE,
Attorneys for Plaintiff in Error.

Rich & Waite

Supreme Court of the United States.

NO. 59.

THE KELLOGG BRIDGE COMPANY,
Plaintiff in Error.

VS.

THOMAS H. HAMILTON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN C. LEE,
Attorney for Defendant in Error.

COMMERCIAL TELEGRAM PRINT.

Supreme Court of the United States.

THE KELLOGG BRIDGE COMPANY,
Plaintiff in Error.

VS.

THOMAS H. HAMILTON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FIRST. Statement of Case.

This Brief will not restate, that which appears in the "statement" of the Brief of Plaintiff in Error. It will supply some omissions.

Hamilton in his Petition (Declaration) set out four causes of action. In the first cause, he set forth the contract under which he erected the Bridge and claimed the contract price, $4,003.00.

In the second cause of action, he claimed for extra materials furnished and paid for at the request of Defendant..... 45.18

In the third cause, the value of extra work done at Defendant's request..... 2,875.00

In the fourth, damages, on account of defective false work..... 150.00
And for damages due to delay in furnishing bridge material..... ..... 2,350.00

Making a total of..... .....$9 423.18
He also set out items of credit in the way of payments to him by the Bridge Co..... $5,729.40

Leaving a balance of..... $3,693.78
for which he prayed judgment.

In its answer to this Petition the Bridge Company admitted liability to Hamilton for the contract price..... $4,003.00
and another item of..... 6.00

Making a total of only..... ..... $4,009.00
It set out the copy of the contract as it appears in Brief of Plaintiff in Error, pages 2 and 3, and denied all other facts and other liability.

The answer also contained a counter claim consisting of many items, making in the aggregate..... .....$10,628.70
and in them were all of the items that Hamilton in his Petition had given the Company credit for, viz.....$5,729.40
Thus showing items upon which there was——————
dispute remaining, only in the sum of..... $4,899.30

The Counsel for the Bridge Company in his Brief page 3, herein filed, heretofore, in resistance of a

motion ~~notice~~ to dismiss, has nearly properly classified the items of its $10,628.70, counter claim thus:

Plaintiff's credits	$5,743.17
Labor on bridge, extra	895.62
Material, tools, etc	1,252.01
Taking iron from river	1,940.20
Repairing iron from river	797.70
Making the total	$10,628.70
From this the answer deducted the contract price of $4,003.00 and another item of 6.00	$4,009.00
Leaving a balance of	$6,619.70
But as Hamilton had already given the Company credit in his Petition, and that credit there stood and yet stands, for so many of the items of the $6,619.70, as made in the aggregate	$1,720.40
There remained disputed of the counter-claim only	$4,899.30

In his Reply Hamilton denied each and all of the items of counter-claim, not admitted and credited to the Company in the Petition. So that the total aggregate of the amount in the counter-claim in dispute was and is only $4,899.50.

Of all these, there are two classes only, in respect to which, it *is* insisted or *can* be insisted, that the trial court committed error. There is no error com-

plained of in respect to either of the aggregate classified items of $895.62 for "Labor on bridge extra," or of $1,252.01 for "Materials, tools, etc." The only two items as to which the court is alleged to have erred are:

"Taking iron from river," $1,940.20
"Repairing iron from river,"..... 797.70

Making together only..... $2,737.70

In support of the correctness of the foregoing, we must quote from the Brief of the Bridge Company, beginning at the bottom of page 11:

"The questions presented by these several alleged errors may very properly be considered together, for they all depend upon the *one question* of whether the Court below erred in its charge, substantially, that by the terms of the contract between the parties, and upon which the action was founded, there was an implied warranty on behalf of the Bridge Company, that the false work, so far as it had been completed was suitable and proper for the purposes for which it was to be used by Hamilton."

From the foregoing it is plain that all the exceptions taken, and all of the assignments of error, go to the single question, whether there was an implied warranty that the false work, sold to Hamilton by the Bridge Company, was suitable for the special purpose for which it was made, and for which it was sold and delivered to Hamilton. If there was such implied contract, then is there no error? It is conceded that if there was such implied contract, the Bridge Company has no claim upon Hamilton for taking the material of the fallen span out of the riv-

er nor for repairing and refitting it for the other span. It will be conceded that Hamilton would have a right to recover for any proximate damages arising from such defective false work sold to Hamilton by the Company.

JURISDICTION OF THIS COURT.

Hamilton contends that this Court has no jurisdiction of this cause, because, under the Statute and the former holdings of this Court the value of the matter in dispute in this Court is less than $5,000. This question has been heretofore made by motion to dismiss for want of jurisdiction, on account of the value of the matter in dispute being less than $5,000. The motion was presented in Briefs, and the motion was denied.

We hope we shall not be in contempt, nor even be guilty of a professional impropriety, if we ask of this Court a reconsideration and review of that holding. We think an inspection of the issues made in this cause, and of the exceptions taken in the lower Court, show these facts:

1st.—That Hamilton, the Plaintiff below, claimed only..... .....$3,693.78

2nd.—That he got judgment for..... 3,039.89

3rd—The Defendant in its answer demanded, in an itemized counter-claim, an aggregate of..... 6,619.70

4th.—The Plaintiff in his Petition and Reply admitted as correct and valid, of the

items of said $6,619 70, amounting in the aggregate to..... 1,720.40

Leaving in dispute only..... .....$4,899.30

5th.—On the trial, the action of the Court below, was excepted to, and now is complained of, only in respect to a part of the items constituting this sum of $4,899 30 This part consists wholly of two classes of items. One class is that for taking the iron of the second span from the river, which is, in the aggregate.....$1,940.20

The other class, is that for refitting the same iron for use again..... 797.70

Total of both items.....$2,737.90

Add interest as prayed for in answer from July 8th, 1878, to time of rendition of judgment, Dec. 19th, 1879..... 236.38

and we have an outside amount of..... .$2,974.28

This brings us to the test question. What, in case of set off or counter-claim, determines the jurisdiction of this Court as to value of matter in dispute in this Court?

We say, by way of preliminary remark, that this Court in 97, U. S., *Frey vs. Evans*, and in 4th Wallace, 164, *Walker vs. U. S.*, has held that "*prima facie*, the judgment against a defendant in an action for money, is the measure of our jurisdiction in his behalf." Such may be regarded, as now, the settled interpretation of the Statute. Were there no coun-

ter-claim in the case at bar, the "measure of the jurisdiction would be the amount of the judgment recovered by the Plaintiff, Hamilton, $3,039.89. But a new element is injected by the Bridge Company's counter-claim. It has a counter-claim, nominally in its answer of $6,619.75 but diminished by the admissions, in both the Petition and Reply of Hamilton, of several of its items, to $4,899 30.

This Court, in Ist Wallace, 66, Ryan vs. Bindley, being called to pass upon what constituted the true criterion for, or measure of its jurisdiction in error to a Circuit Court of Ohio, laid down this rule :

"Where a declaration claims a sum not sufficiently large to warrant Error to this Court, but where the plea pleads a set-off of a sum so considerable that the excess between the sum claimed and that pleaded as a set-off would do so—the amount in controversy is not the sum claimed but the sum in excess, in those circuits, where by the law of the State adopted in the Circuit Court, judgment may be given for the excess as aforesaid. For example: A declaration in assumpsit claims one thousand dollars damages, a sum insufficient to give the Supreme Court jurisdiction; more than two (five) thousand being required for that purpose. The plea pleaded a set-off of four thousand and by the laws of Ohio, adopted by the Federal Courts sitting in that State, (now a matter of Federal Legislation) judgment might be given for the two thousand in excess if the set-off (counterclaim) was proved. Held, that three thousand and not one thousand was the amount in dispute; and accordingly, that the jurisdiction of the Supreme Court attached."

In Ryan vs. Bindley, the facts were in substance the same as in the Bridge Co. vs. Hamilton. Bindley had sued Ryan in assumpsit for $1,000. Ryan

pleaded a set-off of $4,000, praying judgment for the excess, and had a right in that court, (Circuit Court U. S. Southern District of Ohio) to have judgment for the excess. On trial Bindley had judgment for $575.85.

In the case at bar Hamilton sued for $3,693.78. The Bridge Co. pleaded, claiming on a counter-claim, and, fully authorized by law so to do, in the U. S. Circuit Court of Ohio, Northern District, the sum of $6,617.70. Hamilton, the Plaintiff, had verdict and judgment for $3,039.89.

Can any one see why the holding in the Ryan vs. Bindley case as to jurisdiction is not applicable in the Bridge Co. vs. Hamilton? If not then apply the test:

Take from.....$6,619.70
The amount claimed by Hamilton 3,693.78

And we have the jurisdictional sum of.....$2,925.92

A sum entirely too small. This deduction from the.....$6,619.70
Of the amount in fact recovered
by Hamilton..... 3,039.89

Leaves an amount yet too small.....$3,519.81

Might we not stop here and inquire whether Ryan vs. Bindley is yet good law? If so, this Court can go no further. The writ of error must be dismissed. The Court does not say that the difference or excess of the set-off (or counter-claim) is the minimum

amount in dispute, and hence sufficient to confer jurisdiction of the writ in that case, and that the real amount *may* be *more* than that. *It says that the excess was the amount in dispute.*

We will, however, not stop with this case, but will go to another authority established by this Court. We refer to 100 U. S. 675, *Nagle vs. Rutledge.*

That is upon the appeal statute, bringing causes into this Court from the Wyoming Supreme Court. The language of that statute is:

"Writs of error and appeal from the final decisions of the Supreme Court of * * * Wyoming shall be allowed to the Supreme Court of the United States, *in the same manner, and under the same regulations as from the Circuit Courts of the United States,* where the value of the property, or the amount in controversy * * * exceeds *one thousand* dollars, * * * R. S., U. S. Sec. 1909."

The provisions of the Statute, (18. V. Stat. U. S. 316), under which this Court takes jurisdiction of this writ are identical in effect with the Wyoming Statute, differing only in the amount. There it is $1,000; here $5,000:

"Sec. 691. All final judgments of any Circuit Court, etc. * * * Where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court, upon a writ of error."

This Court in 3rd Peters, 33, Gordon vs. Ogden, through Chief Justice Marshall, laid down the following:

"The jurisdiction of the Court has been supposed to depend on the sum or value of the matter in dispute in this Court,

not on that which was in dispute in the Circuit Court." * * "The reason of the limitation is that the expense of litigation in this Court ought not to be increased unless the matter in dispute exceeds $2,000. This reason applies only to the matter in dispute between the parties in this Court."

In the case of Nagle vs. Rutledge, the syllabus is: "This Court has no jurisdiction to review the judgment of the Supreme Court of the Territory of Wyoming unless the records shows that the matter actually in dispute exceeds $1,000.00." While the Court may not have intended in its syllabus to go any further than the language of the syllabus, above quoted, yet it might well have added the words "in this Court."

This is made quite clear by the Chief Justice in his very terse and perspicuous opinion.

The state of the pleadings and the issues made in Nagle vs. Rutledge are like those in Hamilton vs. The Bridge Co.

Rutledge, the Plaintiff, below, recovered judgment against Nagle for $969.60. Nagle had set up a counter-claim of $1,340.00.

An inspection of transcript of the record in Nagle vs. Rutledge, No. 275 of the October term, 1879, now on file in this Court shows—and the opinion corroborates it—that one of the items of the counter-claim was a promissory note against Rutledge for $210 00, calling for interest at the rate of three per cent. a month from June 24, 1882. In the counter-claim the principal and interest at that time were

claimed up until judgment, which was rendered July 26th, 1876.

A further inspection of that record shows that the only exception taken by Nagle, on the trial, was to the disallowance of the three per cent. a month up to the date of judgment, July 26, 1876.

Rutledge, in the pleadings, admitted the validity of the note but insisted that, by various items of credit to which he was entitled, about the time of the maturity of the note, the note was paid and the interest stopped although the note was not taken up and the Court on the trial gave such instructions to the jury as to the law governing the applications of payments that the jury probably found against the right of Nagle to this interest and to that instruction Nagle excepted.

In the opinion the Chief Justice says:

"It is claimed we have jurisdiction, however, because the Defendant set up in his answer a counter-claim for $1.340.00. The only question presented here on that branch of the case is whether the Plaintiff below was liable for interest on the note of $210.00 at the rate of three per cent. a month from the 24th day of June, 1872, until the date of judgment, July 16, ~~1867~~ 1876, or for some shorter period. In no Court could the amount thus put in controversy reach $1.000 00 and since, if error should be found in the charge of the Court on this claim, it would only result in a reduction of the judgment as it now stands and not in an actual money recovery in favor of the Defendant below, it follows that our jurisdiction is not shown by the record and the suit must be dismissed."

A computation of this three per cent. per month

interest up until judgment shows the sum to be $308.70 and if that sum were added to the Plaintiff's recovery, $969.63, it shows a total of $1,278.33, being $298.33 in excess of the jurisdictional amount, $1000.00.

From this it clearly appears that in that case the Court declined, in ascertaining the value of the matter of dispute, to add to the recovery by the Plaintiff the amount in respect to which exception was taken to the ruling of the Court below by the Defendant.

If in the case of Rutledge vs. Nagle we substitute Hamilton for Rutledge and the Bridge Co. for Nagle we might take the opinion of the Chief Justice in Nagle vs. Rutledge and make it read thus:

"To give us jurisdiction in cases coming from the Circuit Court of the Northern District of Ohio, the value of the matter in dispute must exceed $5,000.00."

This writ of error was sued out by the Defendant below, (the Bridge Co.) on a judgment against it for only $3,039.84. It is claimed we have jurisdiction, however, because the Defendant, in its answer, set up a counter claim for $6,619.70 (or more correctly, $4,899.30).

The only question presented here on that branch of the case is whether the Plaintiff below (Hamilton) was liable in the sum of $1,940.40, for taking iron from the river and $797.70 for repairing and refitting the iron so taken from the river, the two sums ag-

gregating $2,737.90, together with interest thereon from July 8, 1878 until date of judgment, December 19, 1879. In no event could the amount thus put in controversy reach $5,000.00, and since if error should be found in the charge of the Court on this claim it would result in a reduction of the judgment as it now stands, and not in actual money recovery in favor of the Defendant below, it follows that our jurisdiction is shown by the record, and that the case must be dismissed."

The points we press on this question of jurisdiction are that it is the value of the matter in dispute in the Supreme Court that determines the jurisdiction.

Also that the value of the matter in dispute in the Supreme Court is that in respect to which exception is taken to the action of the Court below, and nothing other or further.

Also that the amount of the recovery by the Plaintiff increased by the amount of the matter in dispute in the Supreme Court or the ~~Plaintiff's~~ Defendant's counter-claim cannot be taken as the value of the matter in dispute to determine jurisdiction.

If the first two of these points be well taken this Court has no jurisdiction of this case, without depending on the third.

We therefore respectfully ask the Court to dispose of the case by dismissing the writ.

"THE WRITTEN CONTRACT MUST CONTROL."

This is the first legal position assumed by Plaintiff in Error in his brief, page 12. We assert that the written contract must control. We do not admit the ruling complained of is in conflict with the written contract. We do not insist that the written contract shall be either enlarged, restricted or contradicted. We insist that there was no express warranty. We contend that there was an implied warranty arising out of the written sale of this false work. It may be termed in any manner seen fit, but it is a warranty that the law itself raises or implies from the sale of the false work, sold and bought for the special purpose only of putting together and raising on it the bridge spans. The false work did not and could not have any other use or purpose. The ground taken by counsel in their argument is that there can be no implied warranty, because the sale is evidenced by a signed writing. No authority is cited that sustains it. The case of Van Ostrand vs. Reed, falls far short of sustaining the position. In that case, there was an attempt to enlarge a written contract by proving by parol express warranties made orally before the written contract was executed and not incorporated in it. The law did not then nor does it now sanction that.

Mr. Benjamin in his text book on Sales Sec. 622, cites approvingly a case of very high authority, directly in point contradicting the claims of Plaintiffs in Error, 7 Hurlstone & Norman's Reps. 955: "The

Plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the Defendant undertook (in writing, by him signed) to supply the Plaintiffs with troop stores," guaranteed to pass survey of the East India Company officers: Held in the Exchequer Chamber that this express warranty did not exclude the warranty implied by law, that the stores should be reasonably fit for the purpose for which they were intended."

From this authority not only do we have the rule that there may be an implied warranty in regard to the quality of that which is by written contract sold and bought for a certain purpose, that it is reasonably suitable for that special purpose, but that the presence in the written contract of certain other express warranties as to other qualities of the things sold does not exclude the foregoing implied warranty.

In the case of *Shepherd vs. Pybus*, 3d Manning & Granger, 867, by written and signed instrument Pybus sold Shepherd a barge and without any warranty, but the Court held that an implied warranty was raised by law of the fitness of the barge for the purpose intended.

Upon this point we will not multiply authority, but pass to the main question, namely: did the Court below err in its rulings on the admission of evidence; and in instructions given and refused relating to the implied warranty as to the sufficiency of the false work.

IMPLIED WARRANTY.

The Bridge Co. contends that the law did not raise against it any implied warranty that the false work was suitable for the purpose for which it was designed. It says that the rule of *caveat emptor* applies. If it is right in this contention the Court below committed substantial error. If it is not right there is no error.

A reading of the contract between Hamilton and the Bridge Co. shows a very crudely prepared paper. It starts out by saying that Hamilton agrees to furnish and prepare all necessary false work and erect the iron bridge then being constructed for the Railroad Co. at Toledo over the Maumee river, by the Bridge Co. Again further on in the contract it provides that "the said first party (Hamilton) also agrees to assume and pay for all work done, and materials furnished up to the date of execution of this contract, including piling and piles, timber, and other material and labor done in the same," and this is all that is found in the contract, in terms, relating to the false work.

From the answer it appears that the contract was made, in fact, with Hamilton, verbally, December 15th, but not drawn up and signed until two weeks later.

It also appears in the case that the Bridge Co. had contracted with the Railroad Co. to furnish

all materials and erect this Bridge for about $80,000 00, including piers and abutments. There were three fixed spans of about 175 feet each, and a draw of about 185 feet. When Hamilton, on the 15th day of December made the agreement with the Bridge Co. it had already driven all of the piles for the false work for two of the spans and had nearly completed the superstructure of the false work on those piles. The water in the river there was sixteen feet deep and no one, even the most expert, by inspection could know the depth to which the piles had been driven. From the contract it is manifest that Hamilton was to pay for this false work, then done, just what it had or would cost the Bridge Co. and in so far as the Bridge Co. had unpaid, outstanding bills for it he agreed to assume and pay those bills.

The false work was the property of the Bridge Co. In its contract it sold that property to Hamilton. It sold it to him for the specific and only purpose of using it in erecting the two spans of the bridge upon it. It was and could be useful for no other purpose. It was designed in its construction, in its sale to Hamilton and in its purchase by him for that special purpose and no other. No representations as to the character of it were made and no express warranty as to its sufficiency demanded or made.

Hamilton had a right to, and did rely upon the warranty that the law raised in his favor that it was suitable for the special purpose for which it was sold

to and bought by him. He knew that the Bridge Co. had put it there to be used in the erection of those two spans and also had a right to rely upon it being sufficient therefor.

As the bridge was over a stream of water liable to be raised by ice and floods between Dec. 15th and March 1st the Bridge Co. knew, as well as Hamilton, that the piles were liable to be assailed by flood and ice, and that it was of the first importance that they should be driven sufficiently deep to withstand all such strain.

The Bridge Co. whose business was bridging streams with heavy iron bridges, must be held to know that it was very important that the piling sustaining the false work should be driven sufficiently deep to sustain the weight of the span in the course of erection and placing permanently in position.

It was therefore reasonable that the Bridge Co. should impliedly undertake to Hamilton, and Hamilton to expect that they would so undertake, that this piling was driven sufficiently deep to subserve this very necessary purpose. It is a reasonable requirement of the law, also that this piling failing in these important particulars, the Bridge Co. should make good to Hamilton all proximate damages accruing to him therefrom.

Upon the trial Hamilton adduced proofs showing that the false work sunk under the weight of the first span he attempted to raise and occasioned him considerable expense and loss.

Also that when the second span had been brought two thirds forward to completion by him, the false work, owing to ice and flood under that span, was carried away and the material of the span dropped into the river.

Also that it became necessary for him to, and he did, at his own expense, replace the false work and re-erect in place of the second span the material that the Bridge Co. provided for the third span, and that his expense in and about refitting the lost false work was $150.00 or thereabouts.

Evidence was adduced, showing that the loss of the material for that second span in the river was due to the insufficiency of the false work, which the Bridge Co. had put in.

Proofs were also given to show that the Bridge Co. of its own motion and at its own expense took the material of the lost span out of the river and refitted it and delivered it to Hamilton, who erected it into the third span of the bridge.

The Bridge Co. on the trial and now claims that Hamilton should pay the $1,940.20 for taking the iron out of the river, and the $797.70 for re-fitting it again, and also insists that he was not entitled to the $150.00 that it cost him to repair the defective false work, etc., and this claim is made on the ground that in purchasing the Bridge Co. the doctrine of *caveat emptor* applies.

In its brief it cites numerous anthorites showing the existence generally, in sales, of the doctrine of

caveat emptor. The existence of that doctrine Hamilton does not deny, but does deny its applicability to the facts in this case, and contends that the trial Court correctly apprehended and applied the law. In the language of the Court itself, found on the middle of page 24, Transcript of Record:

"Applying this rule to this contract I give it to you as good construction of it that, if the false work already constructed was sold by Defendant to Plaintiff this implied warranty necessarily follows this sale, viz: That the false work has been done in a workman-like manner and was suited to the purpose for which it was put in and to be used by Hamilton and also that a fair interpretation of its terms would be that the Plaintiff was to take all the false work, pay for it, assume the contract made by the Bridge Co. with reference to it and furnish all the additional false work that might be necessary. Taking these two together I direct that by the terms of this contract there was an implied warranty on behalf of the Defendent that this false work was suitably prepared for the purpose for which it was to be used by the parties; and so, gentlemen, if the evidence shows that the part of the work which was said to be defective was such that the Plaintiff could not by examination ascertain its defects—for if they were apparent by a mere examination of the false work it was the duty of the Plaintiff to make that good —he has a right to rely upon the implied warranty, that is, if the defects were such that they could not, by ordinary observation and care on behalf of the Plaintiff, be ascertained and found out."

The rulings of the Court admitting and refusing to exclude evidence as to the sufficiency of this false work and as to the expense of making it good, and as to its contribution to the fall of one span into the river, and as to the non-liability of

Hamilton for the recovery and refitting of the lost span, all is in harmony with and dependent for its correctness, upon the rule of law that this Court shall find to obtain in respect to the alleged warranty. If the implied warranty obtained, then were the rulings and instructions of the Court correct.

CAVEAT EMPTOR, AND ITS EXCEPTIONS.

No Court calls in question the general rule in sales of chattels, of *caveat emptor*. No Court fails to note important exceptions to this general rule. No student of law has failed to observe the apparent and the real confusion in stating and classifying those exceptions. At first the exceptions were those made on the merits of particular cases. As they became numerous, efforts to distinguish and classify these exceptions were made. At this point differences and confusion appeared, and much confusion yet prevails. In 1860, in *Hoe vs. Sanborn*, 21 N. Y. 552, Justice Selden made in his opinion, a valuable analysis of the rationale of the doctrine of Implied Warranties, and aided much in harmonizing incongruous opinions of Courts. He says on page 555:

"It may not be possible to reconcile all the decisions upon the subject of implied warranties upon the sale of goods; but if we keep steadily in view the principle which lies at the basis of all such cases, we shall find that much of the apparent conflict will disappear. It is a universal doctrine, founded upon the plainest principles of natural justice, that whenever the article sold has some latent defect which is known to the seller, but not

to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong, that the Courts will presume its existence without proof; and in these cases, the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the scienter is actually proved, in the other it is presumed."

Upon the obvious probability that the vendor of goods knows whether he has title to them, and the source of his title and its validity, as the purchaser cannot know, rests the doctrine of the law, that the vendor impliedly warrants the title to goods sold. So implied warranties as to quality, in whatever circumstances held to exist, are founded on the legal presumption, that the seller was aware of the defect. None will fail to observe that the large class of articles that pass easily from one to another in the common business of men, could in quality be known nearly equally by seller and purchaser, but otherwise with such chattels as men usually have long or exclusive possession of. The reason for implied warranty of the quality of the latter does more plainly appear than in regard to the former, while to raise implied warranties as to the quality of the latter is reasonable, because latent defects might be much better known to the seller, yet it might be unreasonably in restraint of trade to extend it to common articles of merchandise. The

common law of England and the United States, agreeing in maintaining responsibility for deceit by the seller under all circumstances, rests the doctrine of implied warranty of the quality of the chattel, upon the actual or presumed knowledge of the quality by the seller.

In its earnestness to discourage deception in sales of goods, the law has raised the conclusive presumption of a scienter of latent defects, in its exceptions to the rule *caveat emptor*. Upon this conclusive presumption of the scienter we may rest the implied warranty. The scienter may not in fact exist, but it is better that it be held to exist, within the established limit of the exceptions, than not to exist. It is better to hold him who has had possession of a chattel, with the best means of knowing its qualities, to an implied warranty of quality, than to impose the risk on the purchaser not having means to know. It is more reasonable that he who makes a thing shall understand it, and stand responsible that it is what it is held out to be, or by the purchaser reasonably supposed to be, than that the purchaser should take the risk. An additional argument for the implied warranty by the seller is found in his further knowledge of the special purpose or use for which the purchaser designs the chattel. If it, by reason of unfitness for such special purpose or use deceives the purchaser, the presumption is that the seller has better opportunity to know of such unfitness arising from latent defects, unknown

to, and not discoverable by the pnrchaser. If the seller has been the manufacturer he is presumed to have the best means of knowing the quality of the thing sold. If it has been sold, and purchased for a special purpose or use, the seller, being the manufacturer, has presumptively perfect knowledge of the qualities of what he has made. If, in addition to so knowing the quality of the thing made, he knows what qualities are required for the special purpose for which the thing is designed it is but reasonable that he should inform the purchaser of any defect in those qualities. To fail to do so is a deceit, a fraud; hence the law raises against the seller, who is also the maker, an implied warranty, that the thing sold is free from latent defects, that would unfit it for the use intended.

If the seller knows defects, unfitting the thing sold for the purpose and use to which he knows the purchaser designs to devote it, and knows that the purchaser does not know, and has not opportunity or means of knowing from inspection, such defects, and fails to disclose such defects, he is guilty of a deceit, of a fraud. The doctrine of Implied Warranty in such cases goes only one step further, and says that the seller, who is the maker, with knowledge of the special purpose or use designed by the purchaser, must be conclusively presumed to know of the defect unfitting the thing sold for such purpose or use. The doctrine is more firmly intrenched if the seller is not only the maker, with knowledge of the special

purpose or use, but also has a special knowledge of the qualities required for such special purpose or use. In reason, it can make no difference in the measure of the maker's knowledge of the thing he has made, whether he made it before or after he sold it. Hence there is no reason for holding the maker and seller to an Implied Warranty of the fitness of the thing for the known special use or purpose, when he has made it after he has made a bargain for its sale, and not holding him if he makes it before he has sold it. His means of knowing its qualities are the same in each case, the want of the means of knowledge of the purchaser is the same in each case, and the wrong, injury or loss to the purchaser the same in each case.

In support of the foregoing views we will quote from the opinion in *Hoe vs. Sanborn*, 21, N. Y. 561-2:

"Another exception to the general rule (of *caveat emptor*) which has been recognized in several cases, but with some hesitation and uncertainty, is that a manufacturer, who sells goods of his own manufacture, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. *In regard to the justness of this exception, it would seem, aside from authority, scarcely possible to doubt.* If the vendor *can be proved to* have knowledge of the defect, and failed to disclose it, all agree he is liable. Is it not reasonable to presume that he who made a thing which has a defect arising solely from the manner in which it is made is cognizant of that defect? When the vendor has manufactured the article with his own hands, the inference of knowledge would plainly, in many cases, be strong enough to charge him even in an action for fraud. But if the manufacturing is done by agents, the general principles of law would hold

the principal responsible for those whom he employs. Wherever the vendor, therefore, has himself manufactured the article sold, *or procured it to be done by others*, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied."

The learned Justice, after analyzing many cases, further says:

"But for this hostility to all implied warranties as to quality, it never could have been doubted, that where one sells an article of his own manufacture, which has a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be holden therefor, upon the most obvious principles of equity and justice, unless he informs the purchaser of the defect, to indemnify him against it."

21st N. Y., 566, Hoe vs. Sanborn. On same page, the opinion further proceeds:

"The rule on the subject I hold to be this: The vendor is liable, in such cases for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured: and if he knowingly, use improper materials, he is liable for that also: but not for any latent defect which he is not shown, and cannot be presumed, to have known."

The syllabus in the case is:

1st.—"Upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture."

2nd.—"Where however, there is a latent defect in the materials employed, the manufacturer is liable as upon implied warranty, only where it is proved, or is to be presumed, that he knew of the defect."

3rd.—"It seems that the theory of the common law in respect to implied warranties, rests upon the deceit of the vendor in not disclosing defects of which the probability of his knowledge is so great, that its existence is presumed."

4th.—"Where the knowledge of the vendor can be proved by direct evidence his responsibility rests on the ground of fraud."

5th.—The difference between the two cases is, that in the one the scienter is actually proved, in the other it is presumed."

The Court will understand Hamilton as contending for the implied warranty of the sufficiency of this false work, in material and workmanship, in respect of latent or non-discoverable defects. He does not insist that this warranty is of any thing that was patent upon inspection. The defects were in the length of the piles, and the depth they were driven into the ground, or bed of the river. As the water was 16 feet deep, and as, had there been no water there, he could not upon inspection know the depth of the driving, no inspection could discover the defect. Of necessity the Bridge Co. knew the length of the piles, and the depth of the driving. Hamilton's proofs tended to show that the first span sunk, and the second was swept out by water and ice, because the piles were not driven deep enough. The Bridge Co. by its agents and servants put in these piles, and it knew the special and only use to which the false work was to be put. It also knew, or it ought to have known, and will be, presumptively, held to have known how deep the piles should have been driven to subserve the special purpose.

The Bridge Co. in its brief contends that the purchase by Hamilton of the false work, was an

agreement for a specific chattel in its *then state*, and hence the implied warranty of its fitness, etc.

This is manifestly untenable. Here the seller was the manufacturer. The thing sold, in its most essential feature, the depth of drive of the piles, could not be inspected by the purchaser. It had been made by the seller for the special purpose, for which it was sold to Hamilton to be used. The purchaser knew that fact. Hence he had the right to rely upon a sufficiency for that special purpose.

We will here give quotations from some authorities. Ch. J. Best, in Jones vs. Bright 5, Bing. 533-40 says:

"If a man sells an article he thereby warrants that it is merchantable—that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose."

In *Gray vs. Cox*, 4 B. & C. 108-15, Abbott, C. J. says: "That if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose."

In *Bigge vs. Parkinson*, 7, Hurlstone and Norman's Reps. 959–60, Cockburn, C. J.:

"There is no difference in this respect between goods to be manufactured and provisions to be supplied. * * * Whether upon a contract to supply provisions there is an implied warranty that they shall be reasonably fit for the purpose for which they are intended. Upon that point not a doubt can be entertained."

In 1868, in *Jones vs. Just*, L. R., 3. Q. B. 197, Mellor, J., after reviewing all pertinent English de-

cisions, states the conclusions in four subdivisions, of which the last is:

"Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied."

In regard to sales of goods by description not inspected by the buyer, in Gardner vs. Gray, 4 Campbell, 144, Lord Ellenborough said:

"Under such circumstances the purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. *Where there is no opportunity to inspect the commodity, the maxim of caveat does not apply.*"

In Brown vs. Edgington, 2 Manning & Granger, 279, action on the case, plea not guilty, for fraud in the sale of a rope to be used in hoisting heavy wine vessels. A., wine merchant, sent to B., a rope dealer, for a crane rope to be used in his business. B.'s foreman went to A.'s wine cellar to learn the size and length of rope required, and found B. would have to get one manufactured. This B. did and furnished it, the rope. It proved insufficient and lost a vessel of wine by reason of that insufficiency. Held, "that an implied contract arises out of the contract, that the rope is a fit and proper one for the purpose for which it was ordered."

"Semble, that to raise an implied warranty, it is not necessary that the vendor should also be, or should represent himself

as the manufacturer, where he is told of the purpose for which the goods are required and the purchaser does not select them himself, but relies on the skill and judgment of the vendor."

In their opinions Tindal, C. J. and Bosanquet, Erskine & Maule, J. J. refer to the case of Jones vs. Bright, (5, Bing. 533-40) with approval, and Erskine, responding to an argument that the warranty cannot be implied unless the Defendant was the manufacturer, says:

"It has been contended, that no warranty can be implied unless the seller be also the manufacturer. It is true that in Jones vs. Bright, the vendors were the manufacturers; and that fact was alleged in the declaration, and some stress laid upon it by the judges in their judgments. But it does not follow, because the Court attaches some weight to a fact which clearly makes a party liable, that such fact is a necessary ingredient in the case. Here, the Defendant did not make the rope, but selected a person to make it, and had an opportunity of informing him of the purpose for which the article was wanted. If he did not do so, it was his own fault. Having undertaken to supply a rope for the Defendant's crane, he is clearly liable to this action, the jury having found that it was not a fit rope for that purpose."

Maule, J., said:

"The way in which Abbot, C. J., put the point in Gray vs. Cox, was not that the liability of the Defendant depended on his being the manufacturer of the article sold, *but upon the fact of his knowledge of the purpose for which it was required*, and that he must take care that it was of the proper description."

A year later was decided the case of Shepherd vs. Pybus. 3, Manning & Granger, 867. Pybus upon written contract sold to Shepherd a new barge built by Pybus, and already complete, but also

to be rigged and fitted out with all necessary stores. It was proved that at time of sale Pybus knew Shepherd intended to use the barge in carrying cement from Shepherd's manufactory at Faversham to his wharf in London. Upon use she made water so that the cargo was damaged. Suit was brought to recover damage to cargo, and expense of repairs. Held:

"Upon the sale of a barge by the builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased, is implied, notwithstanding a written instrument containing the terms of the sale is silent as to any warranty."

In Byers vs. Chapin, 28, Ohio State Reports, the third clause of the Syllabus is:

"A party selling articles for a specific purpose, impliedly warrants that they are fit for that purpose, and a failure of such warranty is ground for recission of a contract based upon it."

In 4, Allen (Mass.) 273, Cunningham vs. Hall, the rule of law is declared, that when an article is ordered of a manufacturer for a particular purpose, there is an implied warranty of its fitness which covers latent as well as patent defects.

In 52, Ga. 504, Gammell vs. Gunby et. al. it is held that:

"Where a merchant, whose business was to buy and sell to to meet the wants of customers, sold guano as a fertilizer to a farmer, he impliedly warranted that the article was merchantable, and reasonably suited to the use designed."

Mr. Benjamin, in his work on Sales, in note on page 653, says:

"A contract to manufacture and deliver an article at a future

day carries with it an obligation that the article shall be merchantable; *or, if sold for a particular purpose, that it shall be suitable and proper for such purpose.*"

In support of this he cites a very large number of authorities too voluminous to specify here. We will, however, quote the syilabus in Brenton vs. Davis, 8 Blackford 317. (Ind.):

"If the manufacturer of an article sells it at a fair price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose, at least against all defects not open and visible to the purchaser on inspection."

This was the case of a sale of a boat by the builder, after she was completed, and upon information to the vendor that she was to be used on the White and connecting rivers. She filled with water and was wrecked, and this holding gave the purchaser a right to damages special and general. In the opinion the Court say:

"We do not mean to say, however, that the implied warranty is confined to a Sale by a manufacturer, or that price affects the question. These points are not involved in this cause and we do not decide them."

The Court in the opinion, on page 518,530 N. Y. say:

"A contract to manufacture and deliver an article at a future day, carried with it an obligation that the article shall be merchantable; *or, if sold for a particular purpose that it shall be suitable and proper for such purpose.*

RESULT OF THE AUTHORITIES.

The result of the authorities, English and American, is perhaps, the establishing of the following ex-

ceptions to *caveat emptor*, and the maintaining of an implied warranty by the seller:

1. Where he sells provisions, that they are reasonably fit therefor.

2. Where other merchandise is sold by sample, that it shall conform to sample.

3. Where in the sale of general merchandise, the purchaser has not opportunity for inspection, there is an implied warranty that it is merchantable, salable.

4. Where the sale is by a manufacturer, on an order previously given, there is an implied warranty, that it conforms to the terms of the order and that there are no latent defects in material or workmanship.

5. Where the sale is by the maker of, or a dealer in, the article sold, and it is sold and purchased for a particular purpose, there is an implied warranty that it is reasonably fit for that particular purpose, or is not unfit for that purpose, by reason of any latent defects in material or workmanship.

Applying these rules to the facts of the case at bar, we find the fifth rule completely covering them.

The Bridge Co. manufactured this false work, supplying material and workmanship. It knew the particular and only purpose which it was to be, or could be, used for. It had a special knowledge, as an experienced bridge builder, of the extraordinary requisites in such false work, not only to sustain its

own weight, but that of the bridge itself and to withstand the pressure of water and ice from above. It knew that Hamilton had not inspected, nor knew of the length of or depth of drive of the piling and that it was impossible for him to know by inspection at the time of the sale. It knew too that Hamilton took of it the false work, believing it to be sufficient in material and workmanship. He paid a fair price for it, its actual cost to the Bridge Co.

In the Courts, rulings and charges on the trial, there was a careful attention to the point, that only such latent defects, as Hamilton did and could not know by inspection, were impliedly warranted against.

AMOUNT INVOLVED IN THIS ALLEGED ERROR.

In the pleadings, and on the trial, Hamilton made no claim, save that set out in his fourth cause of action, of $150.00 for loss to him on account of defects in the false work. In that cause of action he did not specify items of that $150.00 nor was any objection made to the testimony of Hamilton on that ground. His claims in his Petition and supported by testimony on trial were, first: The contract price $4.003. Second: Extra materials furnished, $45.18. Third: Extra work done in fitting bridge material, $2,875.00. Fourth: Damages from delay in delivery to Hamil-

ton of bridge material, $2,350.00 and for loss occasioned by defective false work, $150.00.

The chief objection by the Bridge Co., is to Hamilton's resistance to its counter-claims of $1,940.20 for taking the fallen iron out of the river, and of $797.70 for refitting that iron again for the third span, and the charge of the Court thereon. Hamilton insisted that the falling of the span into the water was wholly due to the insufficiency of the false work, and with that insufficiency the Bridge Co. was chargeable. The Court instructed the jury, on request of Hamilton, that the pleadings showing, that the Bridge Co. had agreed to furnish to Hamilton the material already fit and ready to be put in position, and Hamilton had agreed to put it in position and erect it into a bridge, under the law, the ownership of the bridge material remained in the Bridge Co., and Hamilton was a mere bailee of it for hire, to perform service in, about, and upon it; and that as such bailee he was held to reasonable care in protecting and preserving it from loss or injury. Hamilton contended before both Court and jury that he used the very false works that had been furnished to him by the owner of the bridge material, for the very purpose of supporting and protecting it; and that he had good right to, and did believe the Bridge Co., had made it sufficient. The Court further charged that if it found Hamilton had used reasonable care to protect the bridge material, and without his fault it went into the river, and was rendered un-

fit to be put into the bridge until refitted, the expense of recovery and refitting must be borne by the Bridge Co. The correctness in law, and the justness of this position taken by Hamilton cannot be fairly questioned. If ever there was anything just it is that this Bridge Co. should not recover from Hamilton anything by reason of that false work being insufficient.

The Bridge Co. urges, in its brief, p. 21, that the written contract with Hamilton makes him agree "to *furnish* and prepare all necessary false work, and erect the iron bridge," and as to the false work already prepared for the two spans by the Bridge Co., only this is said: "Agrees to assume and pay for all work done, and materials furnished up to the time of executing the contract, including piling, etc." Without comment, we submit, that these provisions in this contract mean expressly, that at Hamilton's *own expense*, and not at the expense of the Bridge Co. is the false work to be provided, but that the Bridge Co. sells to Hamilton, at its cost to it, so much of the false work as was already made, and Hamilton assumed all contracts by the Bridge Co. made in respect to the false work. No distinction on reason or principle can be made between one who has made an article for his own use and sells it for a particular purpose, and the regular manufacturer of articles for the use of purchasers. He knows of the latent defects in one case the same as in the other.

"OTHER PARTS OF CHARGE UNWARRANTED."

Under this caption the Bridge Co. (See Brief 23 and 24) arraigns as impertinent, and misleading of the jury the portion of the charge there quoted.

As we have already intimated, the ruling and instructions of the Court as to the false work were mostly called forth by the Bridge Co.'s attempt to charge Hamilton with the recovery and refit of the last span. They were, however, also pertinent to the claims for $150.00 damages made in the fourth cause of action. In that cause the manner in which the damage from the defects came is not stated. In the absence of a motion requiring the petition in that respect to be made more definite and certain, it was competent on the trial, especially in the absence of objection on that ground at the time, for the Court to allow testimony tending to show any proximate damage, in any way arising from defects. This Court cannot presume there was no testimony to show some delay on account of it in the first span, by reason of it sinking, and in the second by reason of the fall of the material Hamilton had already done some work upon, and by necessary delay in getting other material to take its place, and by the putting of new piles in the place of those carried out by flood. In fact, the charge was pertinent and proper; for on pages 20 and 21 of the Transcript of the Record, it affirmatively appears that such testimony was given.

CONCLUSION.

Upon the whole case Hamilton contends that it appears:

First—That this Court has not jurisdiction of the Writ of Error, for the reason that the value of the matter in dispute does not exceed $5,000.00, and it should be dismissed.

Second—That if the Court has jurisdiction of the Writ, no Error intervened upon any of the grounds or exceptions alleged by the Plaintiff in Error.

JOHN C. LEE,

Attorney for Defendant in Error.

FILED
JAN 12 1899
JAMES H. McKENNEY, CLERK

110-106

Supreme Court of the United States.

The Kellogg Bridge Company,

Plaintiff in Error,

—*vs.*—

Thomas H. Hamilton,

Defendant in Error.

Brief for Plaintiff in Error, in Defense of Motion.

R. & E. T. WAITE,
Att'ys for Pl'ff in Error.

Supreme Court of the United States.

THE KELLOGG BRIDGE COMPANY,
Plaintiff in Error,

vs.

THOMAS H. HAMILTON,
Defendant in Error.

MOTION TO DISMISS.

BRIEF FOR PLAINTIFF IN ERROR, IN DEFENSE OF MOTION.

For the proper consideration of this motion we deem it necessary merely to direct the attention of the court to the issues made in the court below, as disclosed by the record, more fully and more correctly than is stated in the brief submitted in support of the motion.

The plaintiff below brought this action to recover from the defendant, upon four causes of action growing out of a written contract between the parties for the erection by the plaintiff of an iron bridge over the

Maumee river, with materials to be furnished him by the defendant for that purpose, as follows:

First. The contract price for erecting the bridge,	$4003.00
Second. The value of extra materials furnished by him, for and at the request of defendant,	45.18
Third. The value of extra work done by him, for and at the request of defendant,	2875.00
Fourth. The damages sustained by him because of delay in the delivery of the materials by defendant,	2500.00
	$9423.18
Less payments admitted by him to have been made by defendant	5729.40
Leaving a balance of	$3693.78

for which he asked a judgment against the defendant.

The defendant below in its answer admitted its liability to the plaintiff for the contract price, but denied any liability upon either of the other causes of action. It set out a copy of the contract, which contained the following clause:

"And if at any time the said second party (the Bridge Company) is not satisfied with the manner of performing the work herein described, or the rapidity with which it is being done, the second party shall have full power and liberty to put on such force as may be necessary to complete the work within the time named, and provide such tools and materials for false work as may be necessary, and charge the cost of the same to the said first party (Hamilton), who agrees to pay therefor."

And in sixth item of defense "said defendant further answering, and by way of a counter claim to the several claims of plaintiff, says that, not being satisfied with the manner in which plaintiff was performing his said work, or the rapidity with which it was being done by him, it, with the knowledge, acquiescence, and approval of plaintiff, put on an extra force of men, and provided such tools and materials as were necessary to complete said work sooner than the plaintiff would otherwise have completed the same, and charged the costs and expense of such labor and materials to the plaintiff, the items of which appear in a statement of the account annexed to and made a part of the answer." In this account the plaintiff is charged with the same items he has credited the defendant with in his petition, and with other items; and the whole may be condensed and generalized into the following items:

Plaintiff's credits, - -	$5743.17	
Labor on bridge, extra, - -	895.62	
Materials, tools, etc. - -	1252.01	
Taking iron from river, - -	1940 20	
Repairing do -	797.70	$10628.70
Deduct the contract price of $4003, and another item of $6, -		4009.00
Leaving a balance of - -		$6619.70

for which the defendant asked a judgment against the plaintiff.

The plaintiff in his reply "denied each and all of the items of account in the counter claim of defendant contained, and not appearing to the credit of defendant in plaintiff's petition."

Maumee river, with materials to be furnished him by the defendant for that purpose, as follows:

First. The contract price for erecting the bridge, - - - - - - -	$4003.00
Second. The value of extra materials furnished by him, for and at the request of defendant, - - - - - - -	45.18
Third. The value of extra work done by him, for and at the request of defendant,	2875.00
Fourth. The damages sustained by him because of delay in the delivery of the materials by defendant, - -	2500.00
	$9423.18
Less payments admitted by him to have been made by defendant - - - - -	5729.40
Leaving a balance of - -	$3693.78

for which he asked a judgment against the defendant.

The defendant below in its answer admitted its liability to the plaintiff for the contract price, but denied any liability upon either of the other causes of action. It set out a copy of the contract, which contained the following clause:

"And if at any time the said second party (the Bridge Company) is not satisfied with the manner of performing the work herein described, or the rapidity with which it is being done, the second party shall have full power and liberty to put on such force as may be necessary to complete the work within the time named, and provide such tools and materials for false work as may be necessary, and charge the cost of the same to the said first party (Hamilton), who agrees to pay therefor."

And in sixth item of defense "said defendant further answering, and by way of a counter claim to the several claims of plaintiff, says that, not being satisfied with the manner in which plaintiff was performing his said work, or the rapidity with which it was being done by him, it, with the knowledge, acquiescence, and approval of plaintiff, put on an extra force of men, and provided such tools and materials as were necessary to complete said work sooner than the plaintiff would otherwise have completed the same, and charged the costs and expense of such labor and materials to the plaintiff, the items of which appear in a statement of the account annexed to and made a part of the answer." In this account the plaintiff is charged with the same items he has credited the defendant with in his petition, and with other items; and the whole may be condensed and generalized into the following items:

Plaintiff's credits, - -	$5743.17	
Labor on bridge, extra, - -	895.62	
Materials, tools, etc. - -	1252.01	
Taking iron from river, - -	1940 20	
Repairing do -	797.70	$10628.70
Deduct the contract price of $4003, and another item of $6, -		4009.00
Leaving a balance of - -		$6619.70

for which the defendant asked a judgment against the plaintiff.

The plaintiff in his reply "denied each and all of the items of account in the counter claim of defendant contained, and not appearing to the credit of defendant in plaintiff's petition."

Thus it will be seen that each party based his right to recover a judgment against the other upon different and distinct grounds growing out of the same contract; that the defendant not only denied any indebtedness to the plaintiff on its part, but, on the contrary, claimed the plaintiff was indebted to it, over and above all credits allowed by him, in the sum of $6619.-70; and that if either could successfully disprove the claim of the other and maintain his own, he would be entitled to the full amount of his demand.

The right of either party to recover according to his demand depended mainly upon the question of which one was liable for the consequences of a portion of the bridge falling into the river. If the plaintiff was held responsible for this, the defendant would be entitled to its judgment.

The plaintiff succeeded in recovering a judgment, but the defendant is here prosecuting this writ to have the judgment reversed because of certain errors alleged to have been committed during the trial by the court below, and claiming that but for such errors he would have been entitled to and have recovered a judgment in his favor for over the requisite $5000.00.

The record in *Nagle v. Rutledge*, 100 U. S., 675, cited by counsel in behalf of the motion, presented a very different case from the present. It was claimed that your court had jurisdiction of the writ of error because the defendant had set up a counter claim for more than the amount requisite to give jurisdiction, but you found that in no event could the amount put in controversy reach that sum, evidently because he could in no event have recovered a judgment for that

sum. While here the record discloses, as we claim, that the defendant would, upon a proper showing on his part and ruling by the trial court, be entitled to a judgment for more than the statutory amount.

We insist that this case comes fully within the rule laid down in *Ryan v. Brindley*, 1 Wall. 66. "The allegations in the declarations must be taken, generally, as fixing the amount or value for the purposes of jurisdiction; but the subsequent pleadings may so change the original character of the suit as to involve an amount or value in excess of the two (five) thousand dollars, and when this is done, the judgments and decrees of the court below are subject to be reviewed here." In this case, the Bridge Company interposed a counter claim and insisted that Hamilton owed them over six thousand dollars, over and above all demands he had or was entitled to against them, and asked for a judgment in their favor accordingly.

The amount in controversy was by no means, as counsel for the motion would seem to urge, the difference between the counter claim and the claim of plaintiff. It is the amount for which the trial court, upon proper proof, might render judgment. It was not as if the defendant had set up a counter claim generally for a certain gross sum, and the amount of his recovery thereon depend upon the amount the plaintiff should also recover on his claim which was recognized, but the amount due thereon only disputed.

The principles laid down in *Lee v. Watson*, 1 Wall, 337, and *Schacker v. Hartford Fire Ins. Co.*, 93 U. S., 241, also cited by counsel for the motion, have no application here, for there was no declaration upon a

debt of one sum and a prayer for judgment in a greater sum.

In *Gray v. Blanchard*, 97 U. S., 564, it was held that while ordinarily, in an action upon a money demand, the amount in dispute could be determined from the pleadings, yet the court need not necessarily be confined to them, but could examine the whole record. In this connection we would call attention to the fact that the bill of exceptions in this record sets out only so much of the testimony as had reference to the particular errors complained of, and consequently not any to many of the items composing the counter claim. But the pleadings themselves show clearly and conclusively what the issues were, and the amounts which were submitted for determination at the trial.

The right to set up this counter claim as a defense and have a judgment thereon is permitted by the laws of Ohio, as shown by the following sections from the Revised Statutes:

Sec. 5071. The defendant may set forth in his answer as many grounds of defense, counter claim, and set-off, as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, or against other defendants in the same action; and each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer.

Sec. 5072. The counter claim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

We therefore insist that, so far as the plaintiff in error is concerned, the amount in controversy, at the time of and during the trial in the court below, upon the issues as then made up and joined between the

parties, exceeded, as to it, the statutory limit of $5000; and that consequently this court has jurisdiction to hear and determine the question presented by this writ of error.

R. & E. T. WAITE,
Attorneys for Plaintiff in Error.

110 — 104

OFFICE SUPREME COURT U. S.
FILED
OCT 8 1904
JAMES H. MCKENNEY

Supreme Court of the United States.

THE KELLOGG BRIDGE COMPANY,

Plaintiff in Error,

vs.

THOMAS H. HAMILTON,

Defendant in Error.

MOTION TO DISMISS.

BRIEF OF DEFENDANT IN ERROR, IN SUPPORT OF MOTION.

J. C. LEE,

Attorney for Defendant in Error.

Toledo Telegram.

Supreme Court of the United States.

THE KELLOGG BRIDGE COMPANY,

Plaintiff in Error,

vs.

THOMAS H. HAMILTON,

Defendant in Error.

MOTION TO DISMISS.

BRIEF OF DEFENDANT IN ERROR, IN SUPPORT OF MOTION.

The motion is based on the fact apparent in the Record that "the matter in dispute exclusive of costs" does not exceed the "sum or value of Five Thousand Dollars."

The action below was brought by Hamilton, to recover of the Bridge Co. for breach of contract, in respect to the erection by him of a railroad bridge for the Bridge Co., with materials already fitted, to be provided by the Bridge Co. To this claim, the Bridge Co. answered by denial and otherwise, and also alleged a counterclaim of many items, in the aggregate sum of $6.619.70. Of these there are two, only, to which we wish to call especial attention. Issue was taken upon the whole counterclaim by reply.

These two items are in the sums respectively, of $1,940.25 and $797.80, or equal to $2,738.00.

The first of these two items is the alleged expense of recovering from the Maumee river the material of the second span of the bridge, into which it fell, while Hamilton was erecting it.

This expense, it was alleged, Hamilton should have been charged with in the action, and certain instructions and rulings of the Court to that effect were asked but not given as requested, and exceptions taken.

The second item is the same in kind as the first, it being the expense of refitting the material of the fallen span, after its recovery from the river, for replacement in the bridge. As to this item, the same request, refusal and exceptions.

No exception to the action of the Court, touching any other part or items of the counterclaim was taken, and none can be considered in a hearing on the merits of the writ. This is all manifest from the Record.

The Plaintiff in his petition claimed $3,693,78 and got verdict for $3,039 89 and judgment on that verdict. The verdict does not disclose whether any part of the counterclaim was allowed or not. Certain it is, that the measure of the matter in dispute so far as the Plaintiff's claim against the Defendant below is concerned, is the amount of the judgment against him $3,039.89. It is insisted that the Plaintiffs in Error claimed of the Plaintiff below $6,619.70, and by reason thereof, jurisdiction in this Court is conferred As has already been seen, this Court is not called upon to do or say anything about any part of that amount, save the two items, aggregating $2,738.08. If that amount was obtained, it would only reduce the amount recovered to about $300, giving no judgment against Plaintiff below.

This Court seems in Nagle vs. Rutledge, 100 U. S. R. 675, to have indicated very clearly, that if the amount of the items in the set off, and counterclaim, in respect to which the trial Court is alleged to have committed error, is less than the minimum jurisdictional amount, it is immaterial how much is claimed by way of set off and counterclaim The test is, what is the amount in respect to which error is alleged to have intervened on the trial. That amount is $2,738.00 and no more.

This Court in Ryan vs. Bindley, 1 Wall. 66, held that where there are cross demands at law, the matter in dispute is the sum

claimed in excess of the opposing claim, in circuits within States, by whose laws judgment might be given for such excess. Such is the law in Ohio. By this test then, the difference between the claims of Hamilton and the Bridge Co. is the amount in controversy.

The counterclaim is $6.619.70.

The Plaintiff's claim is $3.693.78.

The excess of the former $2,925.92, tested by the above rule is the matter in dispute.

This Court, in like manner, in the opinion in Walker vs. U. S., 4 Wallace 164, and authorities there cited, said "that if the judgment is for the Plaintiff, and not more than two thousand dollars ($5,000 now) and the Defendant prosecutes in Error, this Court has not jurisdiction, for the matter in dispute as to the Defendant, is fixed by the judgment." Approved and followed 97 U. S. 1, Troy vs. Evans.

Again, in 100 U. S. 675, as hereinbefore stated, this Court has clearly stated another condition, limiting the apparent universality of the rule in Ryan vs. Bindley, so that, although Nagle as to counterclaim and set off claimed nearly $2,000, when the jurisdictional amount was only $1,000. Yet because the Error complained of by Nagle went only to a distinct separate part of the cross demand, and that separate part was less than $1,000, it gave the Court no jurisdiction.

This does not conflict with the judgment in Ryan vs. Bindley, for there a competent witness was *wholly* excluded, and his testimony might have gone to the whole of the $4,000 of a cross demand as well as the $575 recovered by the Plaintiff.

Under these authorities we insist that this Court has no jurisdiction in this cause for the reason that the matter in dispute exclusive of costs does not exceed the sum or value of $5,000.

J. C. LEE,
Atty. for Def't in Error.